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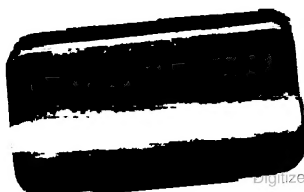
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THE
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**JULY, 1849.**  
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The Land Titles of Pennsylvania.

Although the numerous questions which lie at the foundation of the original titles to land in Pennsylvania have lost their interest with our brethren in Philadelphia and the adjoining counties, there is still a large portion of that State and of the Union in which these questions are continually arising and calling forth, in their investigation, the highest intellectual efforts of the Bar and the Bench. We had occasion, in our January No. to express a hope that Judge Huston, who is confessedly the most competent of any man now living to deal with this subject, would not be discouraged, by the destruction of his manuscripts, from giving to the profession and the people his proposed work on Pennsylvania Land Titles. It now gives us great pleasure to state that the work is in the hands of the publishers. When it appears we shall peruse it with attention.

VOL. IX.—No. 1.

In examining a number of papers connected with this subject we laid our hands upon an argument of 12 or 14 pages in length, closely written on foolscap paper on which are discussed several very interesting questions arising in the case of *Adams v. Jackson* reported in 4th Watts & Sergeant 55. The argument was prepared by J. GEO. MILES, Esq., and, judging from the ability with which the points arising in the case were discussed, had, without doubt a powerful effect in securing the affirmance in the Supreme Court of the judgment below in favor of his client. As matters of general interest, and for the purpose of calling attention to two questions discussed by Mr. Miles, we make the subjoined extracts from his argument. One relates to the question whether a person can acquire a settlement right by the residence of his tenants, and the other treats of the question whether the purchase and locating of a *lost warrant* by the settler upon land previously held by settlement right, is not an *abandonment* of the pre-emption right under the settlement laws:—

"The definition of an actual settlement as declared by the 3d section of the act of the 30th December, 1786, is as follows:—"By a settlement shall be understood, an actual personal resident settlement, with a manifest intention of making it a place of abode, and the means of supporting a family, and continued from time to time, unless interrupted by the enemy, or by going into the military service of this country during the war." It has been judicially decided that by the words "with a manifest intention of making it a place of abode, and the means of supporting a family" is to be understood "a settlement made, grain raised and a person or persons residing thereon" and that the "connecting the personal residence upon the land with the business of raising or growing grain upon it, and by this means supporting the family residing thereon" is an essential ingredient in the title derived from an actual settlement. And his Hon. Judge Kennedy, in delivering the opinion of the Supreme Court, in *Gardner v. Marcy*, 5 Watts 341, declares the intentions of the settler at the time of the settlement being made, a controlling feature in the title. His words are "from the express language of the act, as well as the plain meaning of it, the settler must not only intend to make the land his permanent place of abode, but likewise the permanent means of supporting his family" &c. Now who is the person designated in the act as necessary to have the intention required to accompany the acts done upon the ground? Surely it cannot be the tenant. He cannot have the intention to make it a permanent place of abode, and the permanent means of supporting his family. It must necessarily then be the landlord who is intended by the act, if an actual settlement can be made through the acts of a tenant. His intentions

must accompany and qualify the *acts* of his tenant. But whose family must he *intend* to be ultimately supported out of the land? The words of the act seem strongly to point to his own. It has before been shown that there must be an *intention* to make the land a place of abode, and that *intention* the act says must be "*manifest*." It is said, however, that the act only requires an intention to make it a place of abode for a family—or in other words for any family which the landlord or settler may choose to put into the possession of the land. It seems to be supposed that all the *acts* can be done by a tenant, and that the landlord shall not be held to the performance of any of them, nor shall he be held to intend to perform them. Now the *acts* may be excused in two enumerated cases—to wit, in the case of an interruption by an enemy—or the going into the military service of the country during a war. The interruption by an enemy might excuse the dereliction of the possession—by either the landlord or the tenant, but would the "going into the military service by the tenant" excuse the landlord? The improver himself, if residing on the land could be excused for a breach in the continuity of the possession, during the time employed in the service of his country, but by no intendment of the act could the absence of his tenant excuse him, for then there would be wanting the "*manifest intention*" required by the law. The case of Gardiner v. Marcy, 5 Watts 341, before cited, and the case of Wynkoop v. Heath, 10 Watts 429, seem strongly to point to the construction of the act of Assembly of 1786, that the improver must *intend* ultimately to make the land his place of abode and the means of supporting his family. And these are not the only cases that point to this conclusion. In the lessee of McLaughlin v. Maybury, 4 Yeates 537, it was ruled that "a man cannot be an actual settler on two tracts of land; but if he has children of sufficient age to reside on and cultivate the lands, those children might obtain a tract of land by settlement." Why is it that this is the law? Because the settler's *intentions* have to be accompanied by his own *acts* in this case—he must *intend* to make the place of his own residence a permanent abode, and a means of supporting his family to give him a *title* to that residence as an actual settler, and such an intention is inconsistent with an intention to make another place his permanent home. It is here said the children, if of sufficient age to reside on and cultivate the lands, may acquire title themselves—but not for their father, because in this particular case, the father's *intention* cannot accompany and qualify their *acts*. So in Smith v. Oliver, 11 Sergeant & Rawle 257, it was held that "a man cannot be seized of an improvement right in trust for another"—and in page 266 it is said, if the son was the owner of the improvement, so as to enable him to be a trustee, he was the owner to every *intent*. This shows that if the acts and the intentions are done and entertained by the same individual, he must have all the benefits resulting therefrom. It may be said the construction contended for would prevent a settler from ever acquiring an equity from the acts of a tenant. This consequence does not necessarily follow from the doctrine advocated. If the landlord be so situated that his *intentions* can be connected with, and qualify the *acts* of his tenant, he may have the benefit of those acts. For instance, if the landlord be residing on a tract of land for which he has a legal title, he may acquire an equity as an improver from the acts of his tenant on another tract, provided he has the requisite intentions of making that tract ultimately his place of abode. He can have these *intentions* without jeopardizing his legal title to the tract on which he then resides, because his intentions have nothing to do with that title. But it has before been shown, that if

he be an actual settler on the tract on which he lives, he cannot acquire title to another tract as an improver, because the necessary intentions must be wanting in the one or the other case."

"When Adams purchased the lost warrants of the 12th March, 1794, in the names of Jeremiah John, James John and Josiah John, and had them surveyed, hereby *abandoned* the equity of his improvements, if he had any, 4 Yeates 432, 433, 3 Yeates 73. Neither a plaintiff nor a defendant can be permitted to allege a settlement at any time prior to the day mentioned in his warrant for the commencement of interest, because such allegation would be *contrary to the averment in his warrant*, 4 Sergeant & Rawle 434. A warrantee is *stopped* from making an averment contrary to his warrant, 4 Sergt. & Rawle 434, and 5 Sergt. Rawle 185, *Thealy v. Maul*. Adams then must stand or fall by the legal effects of the warrants and surveys—and they are shifted and can only give title from the date of the acceptance of the surveys, as expressly decided in *Mulholland v. M'Donald*, 5 Watts 175; 3 Yeates 26, *Bell v. Levers*.—The equity of an actual settler rests upon an *implied contract* with the State—that he shall have the land on which he has made his settlement upon compliance with the requisitions of the law governing his case. A part of that contract is that he shall take out a warrant *founded* upon his improvement, and state the date of it truly, so that he may be charged with interest from the commencement of his equitable title. It has before been shown that he is not permitted to *aver* a date prior to the date fixed in his warrant. This is a part of his contract. But can he be permitted to repudiate his original implied contract as the *basis* or *substratum* of a subsequent legal title—and purchase another contract made between the State and another individual, without being subjected to the peril of having his field adjudged to rest solely upon that after purchased contract and the legal consequences resulting from it? In *Heath v. Knap*, 10 Watts Rep. 406, it was held that an unexecuted warrant was a mere contract, a mere chose in action—not the subject of a levy and sale under a f. fa. The settler cannot purchase this contract and obtain his legal title under it—and when some of the consequences resulting from it do not suit him, be permitted to go back to his own original implied contract which he has *abandoned*, as the *ground* of the legal estate which he asks the Commonwealth to confirm to him. If the Commonwealth will permit him to perfect his title by the purchase of a lost unexecuted contract with another, there is no injustice done him by holding him to the legal incidents and effects of that contract. It is an entire *new* contract between him and the State and until an *acceptance* of a survey under it no title is granted as against a prior appropriator. *Diggs v. Downing*, 4 Sergt. & Rawle 352.

Supreme Court of Ohio.—In Bank.

ABSTRACTS OF DECISIONS.

Reported by J. H. Griswold.

The Schooner Aurora Borealis v. Thomas Dobbie—Error—REED, J., Held—1. That in conformity to the decision in *Goodsill v. the brig St. Louis*, the act of 1840 regulating the collection of claims against steamboats and other water craft, had no extra territorial jurisdiction, and only applied to cases arising within the State of Ohio, or to boats navigating the waters within or bordering upon the State, at the time the action arose. 2. That the explanatory act of 1848, extending the operation of the act of 1840 to all cases arising without the State of Ohio, and to all cases then pending, as well as to future cases, is inoperative as to cases pending at the time of its passage. 3. That said explanatory act, so far as it relates to future cases, is valid, but so far as it assumes to put a construction upon acts of the Legislature which the Courts had already construed, and to govern cases pending, is inoperative. 4. That the Legislature cannot exercise judicial powers, and give a construction to their own acts, and bind the Courts in respect to past or pending cases.—Judgment reversed.

Jacob Nice's ex'rs. v. Charles Obertz—Error—Sandusky. HITCHCOCK, J., Held, That in an action upon the covenant against incumbrances in a deed, it is not sufficient for the plaintiff to show that he has been compelled to pay a gross sum to free the premises from dower, but he must show that the dower has been assigned according to the provisions of the statute, either by setting off the dower by metes and bounds, or by assigning it as of the rents and profits. Judgment reversed.

Seth Jennings v. M. A. Johnson, et. al.—Error—Erie.

REED, J., Held, That if property be replevied from a Sheriff, holding it under execution, and the issue be found for defendant, if the value of the property be greater than the amount of the execution, the rule of damages is the amount of the execution, with interest on the same and the costs made on the writ; but if the value of the property be less than the amount of the execution, then the rule of damages is the full value of the property. Judgment affirmed.

IN THE FIRST JUDICIAL DISTRICT OF PENNSYLVANIA—PHIL'A.

JONES vs. WHITEHEAD.

1. A Court of Chancery in England will interpose to restrain such persons as tenants and others having but a limited interest in real estate from committing waste when the acts about to be done will work a lasting injury to the inheritance.

2. A tenant from year to year is bound by law to treat a farm in a husband like manner, according to the custom of the country, and when he does not a Court of Common Pleas in Pennsylvania will restrain him by writ of Estrepement under the act of 29 March, 1822, from doing any injury to the premises by acts contrary thereto. And where the lease has expired by its own limitation such writ of Estrepement may issue without a previous notice to quit.

3. A tenant in England will not be permitted to remove any thing from the land, contrary to the custom of the country and to the good husbandry of the farm, such as dung, compost, or muck, hay, straw and fodder, &c.

4. Ploughing down sod and grass for the purpose of sowing the land with corn under the circumstances of the case, was held to be waste, and the Court restrained the writ of Estrepement issued to restrain the tenant.

The opinion of the Court was delivered by PARSONS, J.

In this case there was a writ of Estrepement issued on a petition of the plaintiff alleging that the defendant was a tenant on his farm for a year, and that he was committing *waste* upon the premises by his ploughing down sod and grass for the purpose of sewing the land with corn; and that if he was permitted to persist in it, those acts would cause a great and lasting injury to the freehold interest of the plaintiff. That the defendant was acting in this respect contrary to the rules of good husbandry, and

was violating at least the implied conditions of his lease. After the issuing and service of the writ, the defendant appeared and moved for a rule to show cause why the writ of Estrepement should not be dissolved. On the hearing of this rule numerous depositions have been read on both sides—and the cause discussed not only upon the facts, but various questions of law have been raised against the propriety of sustaining this proceeding. I think they may all be arranged under the following propositions :

We are asked to dissolve this writ on three grounds :—

1st. Because it is intended that the acts complained of by the plaintiff, if committed by the defendant, are not in law *waste*.

2nd. That before this writ could be sued out by the landlord, he was required by the act of Assembly to give notice to the tenant to quit.

3rd. That under the evidence disclosed the complaint made by the plaintiff that *waste* has been committed is not sustained because those acts are not an injury to his farm.

No principle of law is better settled than that a Court of Chancery will interpose by injunction to restrain such persons as tenants and others from committing waste, having but a limited interest in a possession of property, when the acts about to be done will work a lasting injury to the inheritance. This has been fully admitted in the arguments. But it has been contended this is the limit of the exercise of the power of this Court, and that it has been extended no further. Hence it has been said that a Court of Chancery will not interpose their authority by injunction, where the acts done or threatened to be done, are only contrary to the course of good husbandry, and work no ultimate irreparable injury to the freehold.

But such I apprehend is not a correct understanding of the action of a Court of Equity, nor have their powers

been circumscribed to such a limit. For we find that it is ruled in *Onslow vs. ———* 16 Ves. 178, that the principle relative to the exercise of the power of a Court of Chancery in granting an injunction to stay waste, applies equally in the case of a tenancy from year to year, as to a lease for a longer term ; and that the Judges in that Court have uniformly decided that a tenant from year to year must treat a farm in a husband like manner, according to the custom of the country ; and when he does not a Court of Chancery will give its aid to restrain him from doing any injury to the premises by acts contrary thereto. And so far has this authority been exercised that they will not permit a tenant to remove any thing from the land, except those things which he could do according to the custom of the country where the farm is situated, when the removal of such things be contrary to the good husbandry of the farm.

Therefore it was ruled, in the case of *Lathrop vs. Marsh*, 5 Vesey 258, when it was alleged in the affidavits for the injunction, that the defendant was taking and carrying away from the farm, dung, compost or muck, hay, straw and fodder, &c., and that he held from year to year, although an injunction was not then granted, yet the Lord Chancellor recognized the principle that one would lie. And in the case of *Pultney vs. Shelton*, in the same book, page 147, an injunction *was granted* against carrying away from the premises the dung, soil and compost, or the crops growing from seeds, &c., and against ploughing meadow, and committing wilful waste. In the case of *Pratt vs. Brett* 2 Madd. 373, an injunction was issued against ploughing up ancient meadow, or any of the old pasture land belonging to the farm, and from sowing mustard seed, or other pernicious crops, or from removing from the land, hay, straw or dung, or doing any other waste upon the premises. The case of *Perrat vs. Perrat*,

3 Atk. 94, and Robinson *vs.* Setten 210, and Strathmore *vs.* Borrest 2 Bro., C. R. 73, fully sustain the doctrine that for waste committed, or about to be committed by a tenant from year to year, or persons having other estates, a Court of Equity will restrain the person in possession by injunction.

This subject also seems to have been fully considered by Chancellor Kent, in the case of Kane *vs.* Vanderburgh, 1 John Ch. 11—and the doctrine so fully shown by the cases already cited, is recognized by him. And it is said in 2 Story Equity 197, that an injunction may be obtained against a tenant, from year to year, after a notice to quit, to restrain him from removing the crops, manure, &c., not according to the usual course of husbandry.

From the cases above referred to it is clear that the Courts of Chancery in England, as well as in this country, do not restrict their power of granting injunctions to that species of waste which goes merely to the destruction of the freehold, or a part of it, nor is it confined to that species of waste which is sometimes called a lasting injury to the inheritance, as by cutting down timber, or other trees growing upon the land, or the destruction of buildings, or a direct injury to them; but it seems to be intended to restrain all those kinds of waste or injury to the inheritance which deteriorates the land when used for agricultural purposes, when carried to such an extent as will materially injure the rights of the landlord or reversioner when coming into the possession, so that the property cannot be well appropriated to those purposes for which it was originally intended, when he parted with the possession. The doctrine seems to be that the tenant is bound by law, when he rents, to farm the land in an honest and husband like manner, according to the custom of the country where the land is situated. And if the tenant attempts to divert the land from the usual course of husbandry in such a

way as materially to injure the same, a Court of Equity will restrain him by injunction from committing waste of this description. As I understand the decisions, the Court proceed upon the principle that it is a violation of the implied contract in the lease.

If then a Court of Chancery would interpose by injunction, it is clear that this Court have the power under the act of the 29th of March, 1822, to interfere and restrain a tenant by the writ of Estrepement, for that act authorizes this writ to issue in all cases when waste has been committed, or when it is threatened, if the plaintiff's case is within any of the cases mentioned in the act.

Entertaining this view of the law, in my opinion, the acts complained of by the plaintiff, if sufficiently sustained by proof, are *waste* within the law, and that it is waste of such a kind as will justify the Court in sustaining the writ.

The second reason alleged for dissolving the Estrepement is, that before it issued, the landlord had given no notice to the tenant to quit. The language of the act of Assembly in relation to this point is as follows:—"It shall and may be lawful for any owner or owners of lands or tenements, leased or let for years or at will, at any time during the continuance or after the expiration of such demise, and due notice given to the tenant or tenants to leave the same, according to the provisions of the act of Assembly in such case made and provided," &c., &c. I am inclined to think a fair construction of this act requires that before a landlord can have this writ, he must have given a notice to his tenant to leave the premises, if by the law the tenant is entitled to such notice.

But it has been contended by the Counsel for the plaintiff that in this case there was a lease for but one year, and therefore as the defendant was bound to leave at the termination of the lease, he is not within the act of As-

sembly when the tenant could demand a notice to leave the premises. In the case of *Bedford vs. McElberson*, 2 S. & R. 50: It was held when a lease is to expire at a certain time, there can be no occasion to give notice to quit. In the case of *Logan vs. Herron*, 8 S. & R. 460, it was said by Chief Justice Tilghman, "where the lease is to determine at a *certain time*, there can be no occasion for notice, because the time of termination is as well known to the tenant as the landlord." That decision was made in a proceeding under the landlord and tenant act, and on a construction of the act of the 21st of March, 1772.

In the case of *Lesley vs. Randolph*, 4th Rawle 126, Judge Kennedy, in delivering the opinion of the Court, remarks: "It seems to be established in England, as well as here, that when a lease or demise is determinable on a certain event, or at a particular period, no notice to quit is necessary, because both parties are equally apprised of the determination of the term; and it is not material whether it be only for a single year, or any longer period.

[And in *Overdeer vs. Lewis*, 1 W. & S. 90, it was held that where the lease had expired by its own limitation, the landlord (without notice to quit) might forcibly dispossess the tenant on the instant, by night or by day.—*Ed. Am. Law Jour.*]

It appears from the evidence that the defendant had occupied the farm during the year 1846—in the spring of 1847 he told the plaintiff that he would give him but four hundred dollars for the farm for the year 1847, and it would seem to this the plaintiff assented. It was conceded in the argument there was a new bargain made last spring and that the defendant rented the farm *for but one year*. If such is the fact, then, according to the construction put upon the act of 1772, no notice to quit would be required, and the provisions of the act of 1822 authorize

the writ of *Estrepement* to issue when a notice is given under the landlord and tenant act, and the view taken of that act, is this, that when the lease is to determine at a particular time, this is a notice at the time of making of the contract, and therefore the necessity of any subsequent notice is superceded by the contract itself. Such being the law, in my opinion there was no other or previous notice required to be given by the plaintiff to the defendant before he issued this writ. If this view is correct, then all that is demanded by the act of Assembly seems to have been complied with, and this position assumed by the defendant's counsel cannot be sustained.

The last, and by far the most difficult point which arises in the cause is, whether under the evidence before us the acts complained of are *waste*; or whether the ploughing up the meadow ground was farming contrary to the custom of the country, or whether those acts, if fully proved, would be bad husbandry, and a material injury to the premises. The reason why this point has been rendered difficult of determination arises from the fact that there is much conflicting testimony. Hence when the Court determine law and fact, and are compelled to weigh the evidence, it is always attended with considerable trouble. Frequently there is great perplexity in fixing a correct standard of judgment on the facts, and therefore I have held this case longer under consideration than I should have done if its ultimate decision had turned upon the application of any legal principles. But from a careful examination of the evidence, and upon mature reflection, I am of the opinion that the acts complained of by the plaintiff against the defendant, and which he was committing when this writ issued, are waste—that they are of such a nature as would prove an injury to the plaintiff's farm—that it is a course of farming contrary to the general custom of the country, and a violation of the rules

of good husbandry—and consequently a violation of the implied contract in the lease, and that those acts are of such a character that a Court of Chancery in England would feel required to arrest by an injunction.

It has been contended that what might be considered bad husbandry in England would not be so here. But I am not willing to admit the soundness of this proposition in its general application to all parts of this Commonwealth. In the agricultural part of the county of Philadelphia, where almost every acre of land is cultivated, and made to yield all that can be produced of a vegetable kind, and large portions of some farms are gardens, and long fixed meadow land is producing in value to the cultivator of the soil more than the most fertile bottom land on our rivers would of wheat, I think we should be very cautious about suffering the settled course of farming to be disturbed.

So also when we reflect that the whole vegetable kingdom is searched, aided by the light of science and chemistry, to find manures to enrich the soil, so that every farmer may be satisfied with the cultivation of but a few acres, we should not listen with a ready ear to the claim of a tenant which will enable him to take off from the soil that which will greatly impoverish the land, and return it to the landlord in nearly a barren state, if not reft of its fertility in a condition at least greatly impaired.

It is difficult on such a subject to lay down any general rule, because each case must depend upon the peculiar facts which surround it, and on this point I do not wish to be considered as fixing any definite standard. But simply determine that under the facts disclosed by the evidence, I think this writ ought not to be dissolved.

SIXTH JUDICIAL DISTRICT OF PENNSYLVANIA.

Crawford County—Motion for a New Trial

HART vs. BURNS.

A party who has been obliged to examine the subscribing witness to a deed, for the sole purpose of complying with the legal necessity of this formal proof of its execution, may impeach the credibility of such witness by general evidence, when he has been subsequently called and examined in chief by the other party in relation wholly to other matters than those connected with the execution of such deed.

The opinion of the Court was delivered by CHURCH, President.

It is a general rule in the law of evidence that the introduction of a witness in proof of a cause on trial, is an averment in favor of his general good character for truth and veracity which the party whose witness he is cannot controvert. The reason is that it would be in the nature of a fraud upon the administration of justice for a party to avail himself of the favorable testimony of one of known general bad character, and at the same time retain the right and ability to destroy his credit if unfavorable. To this general rule, however, there are exceptions, or rather the rule itself, as is very plainly indicated in the reason given for it, has no application except where the witness is of the party's own voluntary selection. In ordinary cases, and particularly in this, the examination of the subscribing witness to a written instrument, is not a matter of choice, but is enjoined by law. He *must* be examined if within the power of the party to do so, as *the* witness legally designated, and hence cannot be said to have been selected like ordinary witnesses from the world at large, and thus imposed upon the Court as specially worthy of belief. Nor is the party bound by what the

witness testifies, but may contradict him,—that is, he may prove the facts to be otherwise, and consequently ought to be permitted to introduce any relevant testimony having such tendency.

It may also be observed that the witness to the execution of the paper is not sworn in chief on the issue as a general witness, but his testimony is addressed to the Court. This latter must be satisfied of the *legal* sufficiency of the proof of its execution, and so determine before the same can go in evidence to the jury. Can it then be said that such witness comes within the rule? However, this may be, it seems very clear that the reason for the rule will not apply to a witness whom the law forces upon a party as in the case before the Court.

The question as presented is apparently a novel one. No adjudication directly upon it has been found, except as reported in the case of *State v. Norris*, 1 Haywood, wherein it seems the prosecutor was permitted to discredit his own writing, which is farther than this Court, can go. The main principles here involved are believed to be embraced in *Lowe v. Jolliffe*, 1 W. Bl. 365, and recognized in *Goodtitle v. Clayton*, 4 Burr. 2224, and also in *Richardson v. Allan*, 2 Stark. Rep. 334, (3 Eng. C. L. R. 371.) Also in *Gwin v. Ambrose*, 3 Barn. & Cress. 746, (10 Eng. C. L. 220,) and in our own Courts as reported in *Cowden v. Reynolds*, 12 S. & R. 281, and besides these is clearly sustained in 1 Stark. Ev. 185, and in 1 Greenleaf, sec. 442-3, as well as by the general principles and philosophy of evidence. This Court, therefore, in view of and in accordance with what is believed to be the true spirit and object of the rule of evidence alluded to, answers the question raised in the affirmative. And because we perceive no legal injustice done, the defendant by permitting plaintiff to impeach the general character of one of the subscribing witnesses to the deed, after he had

been called and examined in chief by defendant to matters wholly extrinsic to the deed and its execution, the rule for the new trial will be discharged.

Derrickson, for Plaintiff. Riddle, for Defendant.

Supreme Court of Maine--April 1847.

S. C. 13 *Shepley* 436.

PETER PINNEY & ux. v. ISAAC FERNALD.

1. Where one erects a building upon his own land immediately adjoining the land of another person, and puts out windows overlooking that neighbor's land, he does no more than exercise a legal right; and he cannot by the continuance of such windows without obstruction for more than twenty years acquire any prescriptive rights or easements in favor of ancient lights, which will enable him to sustain an action against the adjoining owner for erecting fences or buildings, by means of which such lights are obstructed.

2. The Rev. Stat. c. 147, sec. 14, was not designed to create or give any such rights as are therein mentioned, or to determine when, or upon what terms, they had already been acquired; but to prevent their future acquisition without conformity to certain prescribed conditions.

3. But if the English doctrine, that a grant or other contract securing to the party an unobstructed flow of light and air will be presumed from the use of windows on his own land, for twenty years, where the law of this State, no such right could be acquired by such use during the time that the person claiming the right was in the occupation of the adjoining land as tenant of the owner.

Case. The plaintiffs declared against the defendant for shutting out the light and air from windows in their house by the erection of a high fence against the windows. The fence was erected on the defendant's own land.

At the trial before TENNEY, J., after the parties had introduced all their evidence, they agreed that a report

thereof should be made, and that the case should be determined by the Court, without any verdict, and that such judgment should be rendered as the Court should deem proper; and that the Court should draw such inferences from the facts as a jury would be authorized to do.

The material facts, which in the view of the Court were proved, appear in the opinion.

Fessenden, Deblois & Fessenden, for the plaintiffs, contended, that it appeared from the case, that the plaintiffs had quiet and uninterrupted possession of these lights for more than twenty years; and that, therefore, there was sufficient ground to presume a grant to them from the owner of the adjoining lot.

This has always been the common law, and has been so declared in this State by statute. Rev. St. c. 147, § 14, 16. This statute is merely declaratory of the common law. *Lewis v. Price*, 2 Saund. 175, note; Stark. on Ev. 969, 1719; 2 Chitty's Plead. 379; 2 Kent, 442; *Baker v. Richardson*, 4 Barn. & Ald. 579; *Cross v. Lewis*, 2 B. & Cres. 682; *Daniel v. North*, 11 East, 371. The law appears to be well settled in England. And it is also the law in this country. 3 Kent, (5th Ed.) 448; *Story v. Odin*, 12 Mass. R. 157; 2 Dane, c. 69, art. 2, § 2; *Hunt v. Hunt*, 3 Metc. 185; *Hill v. Crosby*, 2 Pick. 466; *Thurston v. Hancock*, 12 Mass. R. 224.

It is not necessary, that the adverse possession should be belligerent. It is enough, if no objection is made by the party whose rights are affected by the claims of the possessor. Acquiescence in the use, with a knowledge of it by the owner of the land adjoining, is sufficient.—*Tinkham v. Arnold*, 3 Greenl. 122; *Butman v. Hussey*, 12 Maine R. 407; 3 Kent, 444; *Tyler v. Wilkinson*, 4 Mason 397.

In the occupation of the defendant's lot by the plaintiff
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for a part of the time, there was nothing to prevent the owner from interrupting the easement, and shutting up the windows. The hiring by the plaintiff was enabling him to use the property in his own way, and was an acquiescence in the use of the windows as they were. It would not affect the right. *Cross v. Lewis*, 2 B. & Cr. 682; *Corning v. Gould*, 16 Wend. 531; *Colvin v. Burnett*, 17 Wend. 568; *Bealey v. Shaw*, 6 East, 215; *Sargent v. Ballard*, 9 Pick. 254; *Tyler v. Wilkinson*, 4 Mason 402; *Thomas v. Marshfield*, 13 Pick. 248; 4 Day, 250; *Gayetty v. Bethune*, 14 Mass. R. 53; Co. Lit. 113, b; 14 Pick. 247; 4 T. R. 71; 3 B. & Ald. 304; 2 Chitty's Pl. 379.

Fox, for the defendant, admitted that in England a prescriptive right might be acquired by the use of windows on the line of land for a sufficient length of time; but denied that such had ever been the received law in this country. The doctrine cannot be supported on principle, and is pernicious in practice.

By the use of lights in any way the owner chooses upon his own land, he cannot injure his neighbor, and does nothing, of which complaint can be made. He cannot, therefore, acquire the right to limit or control the adjoining owner in his occupation of his own land. *Parker v. Foote*, 19 Wend. 309; *Nelson v. Butterfield*, 21 Maine R. 220; 2 Conn. R. 507; 3 Kent, 448.

But even under the English law, the plaintiffs have acquired no prescriptive rights against us. While they were in possession of our land under a lease from us, they could acquire no such right. And without including that time, they have not shown any using of the windows for twenty years. *Sargent v. Ballard*, 9 Pick. 251; 3 Dane 252; 7 Metc. 401.

The opinion of the Court was drawn up by SHEPLEY, J.
This is an action on the case brought to recover dama-

ges for the injury suffered by the obstruction of the natural flow of light and air to two windows, put out of the north-east end of the Plaintiff's dwelling house in the city of Portland.

That house appears to have been built during the latter part of the year 1823. The north-east end of it was placed upon the line dividing the lot, on which it was erected, then owned by Henry Titcomb, from the lot then owned by Robert Ilsley, and now owned by the defendant. The north-east corner of it appears to have been placed a few inches upon the lot now owned by the defendant, which was then unoccupied; and it so remained until the year 1831; when George Pierson, at that time the owner, built a shop upon it. That shop appears to have been placed two and a half to three feet distant from the north-east end of the plaintiff's house, and to have been about as high as the fence erected by the defendant during the year 1844, when the shop was removed. The fence was built upon the defendant's lot and within three or four inches of the back window and within about 12 inches of the other window in the end of the plaintiff's house, and so high as materially to obstruct the admission of light and air.

The plaintiff, Peter, hired that shop, with the land back of it and around it, and occupied the same, paying rent therefor, from 1835 or 6, until July, 1844, when the defendant purchased.

The first question presented is, whether the English doctrine respecting the obstruction of light and air is to be received as law in this State.

The original and principles of the law in relation to the presumption of grants was considered in the case of *Nelson v. Butterfield*, 21 Maine R. 234, and it will not be necessary to repeat the remarks and conclusions there stated or to refer again to the authorities there cited. The prin-

ciple, upon which the presumption of grants or other contracts for the security of rights and easements is made, is, that when one person knowingly permits another for a long course of years and without molestation or interruption to claim and enjoy rights, easements, or servitudes, injurious to him or his estate, it would be against man's experience and contrary to his motives of conduct to account for it so satisfactorily in any other manner, as to presume, that he had authorized it by some grant or agreement.

When it appears that the enjoyment has existed by the consent or license of the person, who would be injured by it, no such presumption can be made. Hence there must be proof of an adverse claim and enjoyment. *Bealey v. Shaw*, 6 East. 208; *Gayetty v. Bethune*, 14 Mass. R. 49; *Sargent v. Ballard*, 9 Pick. 251; *Tinkham v. Arnold*, 3 Greenl. 120; *Colvin v. Burnet*, 17 Wend. 564. In the latter case Mr. Justice Cowen, says, "all the cases, which have considered this defence are at least uniform in one thing; that it must combine not only continuity and a peaceable possession without the hindrance of the owner in respect to whose land the easement is claimed, but in complete analogy to its archetype, the bar in ejectment, the possession must appear to have been adverse."

Nothing in the law can be more certain, than one's right to occupy and use his own land, as he pleases, if he does not thereby injure others. He may build upon it, or occupy it as a garden, grass plat or passage way, without any loss or diminution of his rights. No other person can acquire any right or interest in it, merely on account of the manner in which it has been occupied. When one builds upon his own land immediately adjoining the land of another person and puts out windows overlooking that neighbor's land, he does no more than exercise a legal right. This is admitted. *Cross v. Lewis*, 2 B. & C. 686.

By the exercise of a legal right he can make no encroachment upon the rights of his neighbor, and cannot thereby impose any servitude or acquire any easement by the exercise of such a right for any length of time. He does no injury to his neighbor by the enjoyment of the flow of light and air, and does not therefore claim or exercise any right adversely to the rights of his neighbor. Nor is there anything of similitude between the exercise of such a right and the exercise of rights claimed adversely. It is admitted in the case that the erection of windows overlooking the defendant's premises was no legal injury for which he can obtain redress by any legal process. In other words, that his rights have not been encroached upon; and that he has no cause of complaint. And yet while thus situated for more than twenty years, he loses his right to the free use of his land because he did not prevent his neighbor from enjoying that, which occasioned him no injury and afforded him no just cause of complaint.—The result of the doctrine is, that the owner of land not covered by buildings, but used for any other purpose, may be deprived of the right to build upon it by the lawful acts of the owner of the adjoining land performed upon his own land and continued for twenty years.

It may be safely affirmed, that the common law originally contained no such principle. The doctrine as stated in the more recent decisions appears to have arisen out of the misapplication in England of the principle, by which rights and easements are acquired by the adverse claim and enjoyment of them for twenty years, to a case, in which no adverse or injurious claim was either made or enjoyed.

This doctrine has been examined and its want of sound principle exposed in the case of *Parker v. Foote*, 19 Wend. 309. Mr. Justice Bronson very justly remarked, "it cannot be applied to the growing cities and villages of this

country without working the most mischievous consequences. It has never, I think, been deemed a part of our law. Nor do I find that it has been adopted in any of the States." "It cannot be necessary to cite cases to prove, that those portions of the common law of England, which are hostile to the spirit of our institutions, or which are not adapted to the existing state of things in this country, form no part of our law."

Chancellor Kent says, "this common law right of prescription in favor of ancient lights does not reasonably or equitably apply, and it is not the presumed intention of the owners of city lots, that it ever should be applied to buildings on narrow lots in the rapidly growing cities in this country." 8 Kent's Com. 446, note b.

In the case of *Atkins v. Chilson*, 7 Metc. 398, it is stated, that the tendency of the decisions in that State has been favorable to a reception of the English doctrine, but there is a distinct statement, that no opinion is expressed upon it in that case.

It is provided by statute, c. 147, § 14, that "no person shall acquire any right or privilege of way, air, or light, or any other easement, from, in, upon, or over the land of another by the adverse use or enjoyment thereof, unless such use shall have been continued uninterrupted for twenty years." The following sections prescribe the mode, by which the acquisition of such rights may be prevented. It is obvious, that these enactments were not designed to create or give such rights, or to determine when or upon what terms, they had already been acquired. These matters were left to be decided by the law as it previously existed. The design was to prevent their future acquisition without conformity to certain prescribed conditions. It does not even appear to have been intended to declare, that they would in future be acquired by virtue of the statute merely, but rather to prevent their

acquisition without conformity to its provisions, leaving the decision to the previously existing law, whether any would be acquired. But whatever may be its true construction, it can have no influence upon the plaintiff's rights in this case.

The second question presented, is, whether from the facts proved, a grant or other contract, securing to the plaintiffs an unobstructed flow of light and air, can be presumed.

According to the English doctrine such a presumption can arise only, when the right claimed has been exercised in such a manner for twenty years against the owner of the adjoining land, that he might, during all that time, have prevented it by some erection so made as to obstruct the light and air.

The rule is more rigidly stated in the case of *Daniel v. North*, 11 East, 372. Lord Ellenborough says in that case, "the foundation of presuming a grant against any party is, that the exercise of the *adverse* right, on which such presumption is founded, was against the party capable of making the grant." LE BLANC, J., in the same case says, "It is true that presumptions are sometimes made against the owners of land during the possession, and by the acquiescence of their tenants, as in the instances alluded to, of rights of way and of common ; but that happens, because the tenant suffers an immediate and palpable injury to his own possession, and therefore is presumed to be upon the alert to guard the rights of his landlord as well as his own, and to make common cause with him ; but the same cannot be said of lights put out by the neighbors of the tenant, in which he may probably take no concern, as he may have no immediate interest at stake." The case decides, that the landlord was not precluded, where lights had been put out and enjoyed for twenty years, while the premises were in the occupation

of his tenant, there being no evidence of his knowledge of the fact. And how could proof of his knowledge have made any difference? He could then do nothing to prevent it, but by making some erection upon his own land; and he could not lawfully enter upon it and do that, while it was held under a lease by his tenant.

In the case of *Barker v. Richardson*, 4 B. & A. 579, it was decided, that no such presumption could be made, while the premises were in the occupation of a rector as tenant for life, because he was incapable of making such a grant.

In the case of *Sargent v. Ballard*, 9 Pick. 251, the doctrine stated by Bracton is recognized, that "it must be with the knowledge and permission of the owner, and not merely of the tenants."

The premises overlooked from the plaintiff's windows were occupied by them about eight of the twenty years, during which the presumption must have arisen. During those eight years both estates were in possession of the plaintiff, Peter. There could be no adverse enjoyment of the flow of air and light during that time, nor of any thing that could be likened to an adverse enjoyment of it. The landlord could not prevent such enjoyment by his tenant in any way, for he could not enter upon the land while leased to the tenant, to make an erection to obstruct the light and air. And no presumption could be made, if the English doctrine were admitted here, which would enable the plaintiffs to maintain this action.

Plaintiffs non-suit.

JAMES CUSHING *et. al.* versus NATHAN LONGFELLOW.

S. C. 26 Maine, R. 306.

In an action of trespass for mill logs, cut upon the land of the plaintiff and removed to a distance therefrom, the true rule in the assessment of damages is, that the plaintiff should recover the value of the logs, as it was the moment after they were severed from the freehold.

The action was trespass for taking, carrying away and converting the plaintiff's mill logs.

For the plaintiff, on the point, that the instructions as to the measure of damages were correct, they cited Higginson v. York, 5 Mass. R. 341; Buckman v. Nash, 3 Fairf. 474; Hill v. Penny, 17 Maine R. 409.

For the defendant, it was also insisted, that the Judge erred in declining to give the requested instruction. Morgan v. Powell, 3 Ad. & Ellis, N. S. 278; Wood v. Morehouse, Ib. 440.

The opinion of the Court was prepared by WHITMAN, C. J.

From the report of the Judge who presided at the trial we learn that the action is trespass *de bonis asportatis*; that the articles alleged to have been taken and carried away were certain logs, cut on a certain tract of land, containing four thousand acres, situate in the south-west corner of township No. 9, in the county of Aroostook; that the plaintiffs made out a *prima facie* case by showing themselves to be the mortgagees of the tract; and that the logs were cut thereon by the defendant; that thereupon they insisted on recovering, as damages, the estimated value of the logs, at a certain landing place, to which they had been hauled by the defendant; and the Court so ruled, and instructed the jury accordingly. But the defendant insisted that the damages should be estimated according to the value of the timber when standing; and

the jury were allowed to ascertain what such value actually was, with a view to the correction of the verdict in case the whole Court should be of opinion, that such was the true rule for estimating damages. The jury, however, returned their verdict in accordance with the instruction of the presiding Judge. And judgment is to be entered upon this verdict unless the whole Court should be of opinion that the damages were incorrectly assessed. And, in such case, if the rule for the purpose should be found to be as contended for by the defendant, the verdict is to be corrected, as before intimated. If, however, the title to the whole township, as set up on the part of the defendant, should be found to be in him, the verdict is to be set aside, and a non-suit entered.

We are not satisfied that the principle for assessing them, on the one side or on the other, as contended for by each, was correct. The true rule, we apprehend to be that the plaintiffs should recover the value of the logs, as it was the moment after they were severed from the freehold. They then became a chattel, so that trespass *de bonis* would lie for them. This value would, perhaps, be somewhat greater than what, among lumbermen, has obtained the name of stumpage, viz: the value of trees standing.

The plaintiffs, in their action of trespass, have not a right to select any other place, than that where the injury was originally done, to enhance the value of the articles taken, although they might have been greatly enhanced in value by a removal to such other place. It is true they might have seized them wherever they could find them; and might have demanded them, at another place, of one having them there, and in action of trover have recovered the value of them there. *Baker v. Wheeler*, 8 Wend. 505, and cases there cited. But in trespass the rule is believed to be different. In *Morgan v. Powell*, 3 Adol. &

Ellis, N. S. 278, it is laid down, that the value of the property severed from the freehold is that which it has immediately after being severed. That was an action of trespass *de bonis* for coal severed from a mass in the pit, and raised to the pit's mouth, in readiness for sale. The plaintiff in that case insisted on being allowed to recover the value, as it was when raised to the pit's mouth, and the judge at *nisi prius* so ruled ; but the whole Court reversed the decision, and ruled as above. And the rule was said to be the same in the Exchequer. *Martin v. Porter*, 5 M. & W. 351. In *Wood v. Morewood*, it was said to have been held by Park, Baron, in an action of trover for coals so taken, if the defendant took them without being conscious that he was doing wrong, they might be estimated as if they were to be sold by the plaintiff unsevered ; if otherwise, then at the price they would be worth when first severed. 3 Adol. & Ellis, N. S. 440, in a note. The jury returned the former and the decision was acquiesced in. This seems in conflict with the decisions in N. York ; but shows the leaning of the mind, of a very distinguished jurist, towards the equity of not allowing exemplary damages to be recovered against one, not conscious of doing wrong, when he took the goods of another. And the defendant, in the case at bar, may well be believed to have been in this predicament.

Our opinion, not being exactly in conformity to either of the estimates of the jury, a new trial must be granted.

Court of Appeals of the State of New York.**DANKS vs. QUACKENBUSH.****S. C. 1 Comstock 129.**

The judgment of the Supreme Court in this case, determining that the act to extend the exemption of personal property from sale under execution, passed April 11, 1842, is unconstitutional and void as to debts contracted before its passage, *affirmed*.

On error from the Supreme Court. Danks sued Quackenbush in the Common Pleas of Onondaga county, in replevin for taking a horse and harness. The case was this :—

In January, 1837, one Fitch recovered judgment against Danks in the Supreme Court, in an action upon contract, for \$63 85. In January, 1843, an *alias fieri facias* was issued on the judgment, and delivered to Quackenbush, who was a Deputy Sheriff, and who took the property in question by virtue of the execution ; and for that taking the suit was brought. On the trial Danks claimed that the property was exempt from execution by the act of 1842, which enacts that, “ in addition to the articles now exempt by law from distress for rent or levy and sale under execution, there shall be exempted from such distress and levy and sale, necessary household furniture, and working tools, and team owned by any person being a householder, or having a family for whom he provides, to the value of not exceeding one hundred and fifty dollars. (Laws of 1842, p. 193.) The necessary facts were shewn on the trial to bring the property in question within the exemption declared by this statute, provided the statute was to be so construed as to apply to debts contracted before its passage, and if such was the construc-

tion, then provided it was a constitutional and valid statute as to debts of that description. The defendant insisted that it did not apply to pre-existing contracts, and if it did, that it was so far unconstitutional and void. The Court charged the jury that the property was exempt, and the jury accordingly found a verdict for the plaintiff, on which judgment was rendered in his favor in the Common Pleas. Quackenbush having made a bill of exception embracing the above questions, removed the judgment by a writ of error into the Supreme Court, where the judgment was reversed upon the ground that the act in question was unconstitutional and void as to antecedent contracts. (*See 1 Denio, 128, where the opinion of the Supreme Court is given at length.*)

A record of reversal being made up, Danks now brings error to this Court.

A. Taber, for plaintiff in error.

1. The statute in question makes no exception of executions for debts which had been *previously* contracted, and was evidently intended by the Legislature to apply to all executions levied after it went into effect. (*Sackett vs. Andross, 5 Hill, 334.*)

2. Before the Court will declare an Act of the Legislature unconstitutional, a case must be presented in which there is no rational doubt. (*Dartmouth College vs. Woodward, 4 Wheaton's Rep. 625; Exparte McCollum, 1 Cow. Rep. 550.*)

3. The statute in question is not a "Law impairing the obligation of contracts," within the meaning of the Constitution of the United States. (*Bronson vs. Kinzie, 1 Howard 311; McCracken vs. Hayward, 2 Ib. 608; Sturges vs. Crowningshield, 4 Wheat, 122.*)

Geo. F. Comstock, for defendant in error.

1. The Act of 1842, extending the exemption of property from execution, cannot, consistently with settled rules

be so construed and applied as to affect pre-existing contracts. (*Gilmore vs. Shuter*, 1 Freeman 466. S. C. 2 Mod. 310; *Couch vs. Jeffries*, 4 Burr. 2460; 6 Bac. Abr. 370; 2 Atk. 36; 1 Vesey, Sen. 225; 2 Ld. Raymond 1350; *Osborn vs. Huger*, 1 Bay Rep. 179; *Ham vs. Claws*, 33. 93; *Dash vs. Van Kleeck*, 7 Johns. 467; *Sackett vs. Andross*, 5 Hill 334, 7 and 362, 5.)

2. The act in question under a retrospective construction, is in violation of that provision of the Constitution of the United States which prohibits the State Legislatures from passing laws impairing the obligation of contracts and is therefore void. (*Sturges vs. Crowningshield*, 4 Wheat. 122; *Green vs. Biddle*, 8 do. 1; *Mason vs. Haille*, 12 do. 370, 318, 337; *Bronson vs. Kinzie*, 1 Howard 311; *McCracken vs. Hayward*, 2 do. 608; 1 Car. Law Repos. 385; 2 do. 428; 7 Monr. 11; do. 544; do. 588; 4 Litt. 34; do. 53; 6 Monr. 98.)

After advertisement, **JEWETT, Ch. J., and BRONSON, RUGLES and GRAY, Js.**, were for affirming the judgment of the Supreme Court, upon the ground stated in the opinion of that Court.

And **GARDNER, JONES, JOHNSON and WRIGHT, Js.**, were for reversing the judgment. The Court being equally divided, the judgment of the Supreme Court was affirmed.

designed to indicate the manner they are to hold, viz : share and share alike, and the quantity of their respective interests in the legacies, viz : an absolute estate. There is, therefore, nothing in these words to exempt the case from the operation of the general rule. It is, however, insisted that the point is ruled in *Sevor vs. Bernett*, a case not yet reported. But that case is clearly distinguishable from this. *Sevor vs. Bernett*, was decided on the peculiar wording of the will indicating an intent to give to the children first, but if they were dead, then by description to the legal heirs, as descriptive of those entitled to take. The words of the will were : "I give and bequeath one fourth part thereof to the children or legal heirs of my brother David Sevor in equal shares alike." In this case is used the copulative.

It was supposed the legal heirs were intended in case of death, and that therefore grand children came within the description, and were entitled to take. Nor do we see anything in the operation of the act of 6th May, 1844, which interferes with this construction. The act was intended to prevent a vested legacy from lapsing by death, which cannot apply here, as the legacies did not vest at all until the death of the testator.

Decree affirmed.

Partv Walls.

[Reported for the American Law Journal by F. O. BRIGHTLY, Esq.]

ESCHERT vs. WALLACE.—In this case, the District Court for the city and county of Philadelphia, on the 15th of September, 1849, affirmed the point decided by the court of Common Pleas, in *Brierly vs. Tudor*, 2 Am.

his wife's brothers and sisters; and inasmuch as the bequest is to them as a class, those only who were in being at the time of the testator's death can take. The leading principle in relation to such a clause is, that when a bequest is to children as a class, children in existence at the death of the testator are alone entitled (among which posthumous children are to be considered). And it will be no defence that the bequest is to children begotten or to be begotten. 14 Ves. 574-6; 2 Williams Ex'rs, 727; 1 Bro. C. 532; 2 Co. 190; Daniels vs. Dallas, 5 Mad. 332; Scott vs. Harwood, Brown Ch. 470; North vs. Barbage, 2 Atk. 121; Heath vs. Heath, 2 Ves. 83; Hainsley vs. Chaldron, Amb. 348; Isaacs vs. Isaacs.

The same principle is also ruled in *Pemberton vs. Park*, 5 Bin. 607. Chief Justice Tilgham states the rule thus: when a man devises a sum of money *generally*, to be equally divided among the children of A., those only who are in being at the death of the testator shall take; the reason is that it was the intent the legacies should be vested at that time, and that the legatees should then receive their money. Mr. Justice Yeates says: "when the devise or gift to the children is general, and not limited to a particular fund, it is confined to the death of the testator." This, then, being the general rule, is there anything to make this case an exception? It is contended there is, because the devise is to the children share and share alike, to them severally and their heirs and assigns forever. But it is difficult to distinguish this case from the rule as stated by Chief Justice Tilgham in *Pemberton vs. Parke*. There it is to be equally divided among the children: Here it is to be divided among them share and share alike—words conveying exactly the same meaning. It is clear these words are not intended to designate the persons who are to take to control the general expression, or to determine the time when the legacies are to vest, but are

Withers vs. Weaver. Lancaster, C. P. ROGERS, J. In articles of marriage settlement when it was agreed "that the estates of the respective parties, real and personal, shall, after the consummation of the intended marriage, be held and enjoyed by both during their joint lives as if the article had not been entered into," each party will hold uncontrolled dominion over their respective estates during the coverture so as to grant, sell, transfer or give, with or without consideration, (if bona fide and not in fraud of the article,) at their will and pleasure.

But in this case the gift by the father to his son was not consummated by delivery; and therefore goes to the wife under another covenant that all property should so go if she survived. Affirmed.

Cryder's Appeal. Huntingdon. ROGERS, J. Where a testator gave legacies "to be paid out of the sale of the first within mentioned tract of land or farm, and if that be not sufficient, the balance to be made up out of the falling mill property," they are specific: and as the amount in part went in payment of debts, which was a lien on all the lands devised, the other lands specifically devised, must contribute. Affirmed.

Forney, Administrator of Reitzel, vs. The Com'th. Lancaster, C. P. BURNSIDE, J. The act of 1811 makes the balance due the Com'th on the settlement of the accounts of any public officer a lien from the date of the settlement on all the real estate of the principal as well as sureties, throughout the Commonwealth; and the act of 1827 requires the Auditor General to transmit to the Prothonotary of the proper counties certificates of such balance to be entered of record; yet it is not necessary in such transcripts, to name the sureties for the purpose of creating a lien against their real estate. It is sufficient if the transcript certifies the balance against the principal, to bind the sureties in the same county, without naming them. Affirmed.

Commonwealth ex. re. Dysart vs. McWilliams. BELL, J. The pleadings in this case did not raise the question which the relator sought to be decided. But this Court following the example of the Court below, decided: That the supervisors of a township, under a special act of Assembly authorizing them *ex officio* to subscribe for the capitol stock of a turnpike company may do so; and may raise the funds by taxing the inhabitants of the township, at a rate authorized by the act of 1834.

An act of Assembly authorizing the officers of a municipal corporation to subscribe *ex officio* to the capital stock of a company designed to facilitate and increase the commerce and intercommunication of the country, is constitutional.

Hinds et. al. vs. Scott et. al. Miffiin. BELL, J. The lien of a judgment as between the debtor and creditor does not expire by the mere

lapse of time, short of the period necessary to raise a presumption of payment. The act of 1796 requiring a revival every five years to continue the lien, is only for the protection of subsequent purchasers for value, and younger judgment creditors. Where no other claims intervene, the creditor may pursue the land by levy and sale after the expiration of five years.

(N. B.—On this point Mr. Justice COULTER dissented. From his oral remarks in expressing his dissent, I understood him to hold, that under the act, after the lapse of five years, the judgment is dead as a judgment; and no valid sale of land can be made on it, without revival by *scire facias*.)

Though a *conditioi exproas* after a lapse of five years from the issue and levy of a *fi. fa.* is irregular, and on motion will be set aside, and a *sci. fa. post an. et diem* required, yet it is insufficient to avoid a Sheriff's deed, in the collateral suit of ejectment. The *sci. fa.* is for the protection of the creditor, and he may waive it, as is frequently done. Does he do so, neither he nor those claiming under him, can take advantage of the irregularity to question the validity of the sale.

The non-return of an execution by the Sheriff will not affect the validity of his conveyance. The Court may consider the deed as his return.

The possession of a Sheriff's deed is *prima facie* evidence of the delivery and the payment of the purchase money, without a receipt at the foot of it. The acknowledgment in the body of the deed is sufficient; besides, by making a deed the Sheriff fixes himself for the price bid, to the creditor and owner.

A mis-recital of the *venditioni* in the Sheriff's deed will not vitiate it. Reversed, &c.

Hewitt vs. Halings. Blair. ROENNA, J. If a vendor brings ejectment to compel payment of the purchase money, and recovers a judgment, either by confession or on verdict conditioned that it be released on payment of the balance due within a prescribed time, and the time is suffered to pass without payment, the vendor may take possession and keep the land as absolute owner.

In view of this statement of the law, Mr. Justice ROENNA suggests to the profession, a defect generally, in framing conditional verdicts. Instead of vesting an absolute title in the vendor, on failure to pay at a time fixed, the verdict should contain a decree of sale either by the Sheriff or a master, under the direction of the Court, for the benefit of the vendor and vendee, and all other persons having an interest in the proceeds. This it is suggested would secure the interests of all concerned in the property. The law as above stated is so fairly settled, and so many titles depend upon it, that this Court, without the aid of the profession as recommended, cannot apply a remedy. Affirmed.

Stayman vs. The Carlisle Bank. ROGERS, J. The action of assumption cannot be maintained in Pennsylvania by one stockholder in a bank against the corporation for his proportion of the capital stock distributed by the Board of Directors to other stockholders whom they thought entitled to it, in case of winding up and liquidating.

(N. B.—On this point Mr. Justice BURNSIDE dissented.)

The proper mode of proceeding is by bill in Equity, when all the parties in interest can be brought before the Court, and a decree moulded to embrace cross equities and liabilities, so as to do justice to each.

Affirmed for the reasons given by Judge HERBURN.

Loomis' Appeal. Lancaster, O. C. GIBSON, C. J. As between legatees and devisees, a testator may charge any part of his estate with the payment of his debts, either by express words or by necessary implication; but when he has not done so, but on the contrary it appears, as in this case, that the legacies to his daughters and grand children were demonstrative not general, the executor, who is a devisee, cannot even under an order of the Orphans' Court, apply the fund raised from the sale of the land, out of which the legacies were to be paid, in easement of his own estate. As each part of the fund was bound to contribute to the payment of the debts, the legacies and devised estate must abate *pro rata*.

The Orphan's Court has power, though it has not been specifically given, to marshal the assets between legatees and devisees: otherwise there would be a gap in the system. As a Court of Equity with jurisdiction limited to particular subjects, it has all the powers necessary to give effect to its jurisdiction, within the circuit of its action; In giving general jurisdiction of a particular subject, the Legislature impliedly gives every ancillary power necessary to the exercise of it; and the grant of a power indispensable to the administration of justice is not to be defeated by the accidental omission to furnish the details. And as in this case the power being remedial and beneficial, is entitled to a benign interpretation.

Decree reversed, &c.

Brinton's Estate. Lancaster, O. C. COULTER, J. On a proceeding by a legatee to compel payment from the executors, they cannot set off errors in the settlement of their account in the Orphans' Court. A decree of the Orphans' Court can not be touched collaterally, except for fraud or want of legal notice to the party complaining.

When it does not appear plainly from the will, that the legacy is for the sole and separate use of the wife, the husband may proceed to reduce to possession if the Court will not interfere; though they will always, under circumstances calling for it, protect the interests and rights of the wife. Such cases are those in which the husband abandons his wife and then attempts to reduce her choses in action into possession.

Schock vs. The Administrators of Hertzler. LANCASTER, C. P. ROGERS, J. —The release of one or more joint, or joint and several debtors, operates as a discharge of all the others, only where the effect is to increase the responsibility of those who are not included in its terms. When the responsibility of the other obligors is not increased, they are released *pro tanto* only. Judgment reversed.

Howett's Estate. LANCASTER, D. C. COULTER, J. The lien of the mechanic and material man ought not to be extended beyond the terms of the statute, because it is often a secret lien extending back from the date of its entry and publicity, to override honest and fair judgments. Therefore, when the front wall of a house was taken down, the roof taken off; except the rafters, but the other walls left standing on the same foundation, the floors remaining, it must be considered practically and ornamentally a remodelling and repairing, and not within the statute of mechanic's liens. Reversed.

Bingham & Bro. vs. Young & Cassell. LANCASTER, C. P. COULTER, J. Secret or private sales of personal property by an officer of the law, charged with execution, are not to be countenanced. Publicity is in every respect indispensable, otherwise property might be transferred or sacrificed by collusion. In this case the Sheriff made a levy, and the same day the plaintiff in the *fi fa*: directed and agreed with the Sheriff to permit the goods to remain in possession of one of the partners, who was authorized to continue selling the goods, but to pay the proceeds to the Sheriff. — Subsequently other creditors issued executions and directed the Sheriff to proceed, which he did by selling at public sale. Held, the first arrangement is illegal, and Bingham & Bro., the first execution creditors, are postponed. Avenues to fraud are to be closed, though no actual fraud is charged in this case. Affirmed.

Cunningham vs. Garvin. BELL, J. Where a contractor on a railroad had a retained per centage, which he assigned for the benefit of certain creditors, then threw up the contract, and another stepped in to perform, in whose favor the *cestui que trusts* drew an order upon the assignee for the retained per centage; the order is irrevocable, and is founded upon sufficient consideration. If the contract be not finished, nothing could accrue to the creditors. And it is the same whether the order be drawn before or after the completion of the contract.

In this case the creditors after drawing the order, received the money from the assignees. The action for money had and received will lie. — Affirmed.

Franklin Beneficial Association vs. Commonwealth ex. re. Axer. LANCASTER, C. P. GIBSON, C. J. Though a society for mutual assistance in time of sickness is legal, and no principle of public policy forbids an ar-

ticle making an exception against those who follow the profession of a soldier, yet as such a condition holds out to the corporators inducements not to serve in the army, it is not to be favored in construction.

In this instance the relator's case may be within the reason, but is not within the *letter* of the article, beyond which it will not be carried. "No soldier of the standing army shall be capable of admission; and any member who shall *voluntarily enlist as a soldier* shall loose his membership." The meaning of the word "enlist" is fixed, by the words "standing army" in the first branch of the sentence. Besides, it is to be taken in its popular sense; and in England from whence it came, and in these States, it means not merely to enroll the name, but to sign a written contract of military service with the government. It will not apply to volunteers for the war. Affirmed.

Neel vs. Bank of Lewistown. Mifflin. COULTER, J. The plaintiff in a judgment has a right to issue and levy upon property which has been assigned, or is claimed by another than the defendant in the judgment, for the purpose of having the right tried by jury; (though he and the officers will be liable as trespassers if found in the wrong) and it is error for the Court to stay his proceedings, whilst attempting to sell the property in dispute.

The order staying the *vend. ex.* is reversed, and the plaintiff allowed to issue an alias.

Hackadorn's Appeal. Huntingdon. ROGERS, J. The incination of the Courts is to avoid unnecessarily the creation of a multiplicity of liens; for if encouraged they cause perplexity in the transfer and sale of real estates. Hence, in order to charge land in favor of a legatee, the testator must express his intention to that effect by direct expression, or plain implication on the face of the will. Here there is no express intention declared, nor is it implied, and the devisees of the land can only be held personally liable. Affirmed.

Roger's Appeal. Blair. COULTER, J. A fiduciary relation requires vigilance as well as honesty. Where therefore, a guardian might have secured and collected money by attention at one time, he will be held liable.

So when a guardian vests the funds of his ward in an enterprise of doubtful safety, such as a transportation company, though at the same time he invests his own funds in the same company, he will be held liable.

So where in case of a judgment note, the collection of the money being doubtful, and the guardian took a deed of real estate in his own name in consideration of debts due the wards as well as himself, and did not record a declaration of trust for some time afterwards, so as to afford evi-

dence that had the property appreciated in value, it would have been for his benefit, he will be chargeable.

Either of these conversions of the property of his wards is unjustifiable except from imminent necessity.

Decree reversed so as to charge the guardian.

Prough vs. Entekin. Huntingdon. ROSEAS, J. The act of July, 1842, "to punish fraudulent debtors, &c." is intended to punish an offence; not to be used as a means of collecting debts.

In this case the plaintiff was compelled to pay money to the defendant while in prison, under arrest, on a charge under the act, and afterwards to confess a judgment for the money before the justice who issued the criminal warrant, at his instance; and the promise was from the first held out to him that if the money be paid he should not be further prosecuted.

Under these facts the Court below ought to have instructed the jury that the plaintiff had furnished proof of want of probable cause, (in this action for a malicious prosecution,) from which the law would infer that the defendant was actuated by malice or improper motives.

The effect of the rule upon this point will be to throw the onus of proving probable cause on the defendant, in an action for malicious prosecution.

The further rule will probably obtain; that when no debt is due at all, or when the demand is unjust, the evidence of want of probable cause is conclusive; but when there is a debt shown by the creditor, it is *prima facie* only, and may be rebutted by the defendant.

The indebtedness must be shown by other evidence than by confession while in prison, or under arrest, or by judgment confessed in pursuance of a compromise, or by any coercion arising from the criminal prosecution.

Gable vs. Bressler. Centre. BURNSIDE, J. In an action of ejectment, the docket of a suit before a justice between the same parties for trespass on the same land, in which a judgment was rendered against the defendant and afterwards paid, is no evidence of disclaimer of title by defendant. The justice had no jurisdiction as to title, and it was wise not to appeal.

As the plaintiff must recover on the strength of his own title, a lease to Cook cannot be received in evidence. Whether Gable's or Cook's is immaterial to him.

Gable's improvement commenced in 1816, subsequent to the act of 28 March, 1814, though his warrant was subsequent to plaintiff's. The Deputy Surveyor ought to have given him notice of survey on plaintiff's warrant. Affirmed.

Lytle et. al. vs. Smyser. Adams. BELL, J. A judgment recovered

on a *scire facias* sued out to revive and continue the lien of a prior judgment *quod recuperet*, is for some purposes in the nature of a new judgment, yet it does not operate to merge and extinguish the former judgment. The original judgment subsists for the purposes of lien, notwithstanding a further lien may be acquired by the new judgment; and the same is true of any further judgment of revival.

In this case, the judgment contested, is founded on the second judgment of revival by *sci. fa.* on the original. There had been several intermediate *sci. fas.* and judgments, to which the terre tenants were not parties; and it was held that the plaintiff was not bound to go upon the last *sci. fa.* on the original, or go back to the original, but could proceed upon any one in which the terre tenants had notice. Affirmed.

Comfort vs. Eisenbise. *Miffin.* BURNSIDE, J. Comfort was the bail of Eisenbise for rent. Before judgment was obtained against them, Eisenbise made application for a discharge under the bankrupt law. After his discharge, Eisenbise told Woods the attorney of the plaintiff in the judgment at that time obtained, that he did not want Comfort pushed; that he would himself pay it by spring. Subsequently the judgment was paid by the sale of Comfort's real estate, and this suit was brought against Eisenbise for the amount. Held, that the promise to Woods is sufficient; the moral obligation will sustain it. Reversed, &c.

Campbell vs. Gates. *Centre.* COULTER, J. On a contract to raise and deliver so many tons of iron ore, though our statute fixes 2,000 lbs. for a ton, yet when it was proved that the custom of the country is to buy and sell by gross weight, and that the plaintiff acquiesced by allowing his ore to be weighed on scales fixed at 2,240 lbs. to the ton, such custom will control the statute.

On a rescision of a contract by one party which was to last a term of years, the jury in estimating damages may take a comprehensive view of the circumstances, and especially may estimate what a party might have made during the time, as well as present losses.

Judgment affirmed.

Lancaster County Bank vs. Stouffer. Lancaster, C. P. GIBSON, C. J. As a husband has an independent estate in his wife's land which may be claimed by his separate act, it will be bound as an inchoate one, by a judgment against him for his separate debt. As it has been decided that the purchase money of land converted for a special purpose, still retains the character and quality of land, so as to remain subject to curtesy and dower, the lien of a judgment which bound the curtesy before conversion, adheres to it afterwards when money is substituted for the land. The husband's release, on a note being given for the use of his wife, could not divest the creditor's interest in it, which was fixed by the judgment, nor

could the wife's certificate of her consent that the money be paid to him under the act of 1832, to enable him to release, effect any interest but her own.

With the note as subject of attachment, the plaintiff had nothing to do, for payment to the wife's trustee, or to her would be no payment as against him.

The plaintiff may have execution of the equivalent of the land bound by the judgment. His freehold has been converted into money, and the plaintiff is entitled to the possession of the farm, and to take the produce of it during his life, by giving security for the ultimate restoration of it to the wife or her representatives.

A sequestrator is unnecessary, as the plaintiff is entitled to have the management of the farm; besides the act of 1841 authorizes such an appointment only when unconverted life estates are taken in execution in order to make the debt out of the rents and profits without a sale.

But no appeal is authorized and it is quashed.

Witmer vs. Lefevre. Lancaster, C. P. GINSON, C. J. The Legislature has power to divest a husband's freehold in his wife's estate with his consent, so as to free it from the claims of creditors who have not obtained a lien on it. But whether the Court is at liberty so to interpret it as to give it a retro-active operation against a creditor who had brought an action and incurred costs, at the time of the enactment, with a view to obtain a lien and satisfaction out of the curtesy, is a question. The rule has been to give a retro-active operation to statutes which operate not on the right, but the remedy; here it would operate on both. That the husband has an indefeasible freehold in his wife's land as tenant by curtesy, and that his creditors have a right to seek satisfaction from it is shown in *Bank vs. Stouffer*. But this act would take away their rights, though actions had been commenced before its passage.

This Court has refused a retro-active operation to statutes which would bar actions pending, where it has not been compelled to do otherwise by direct and positive words. This embraces the principles of this case.

But the Court had no right to appoint a sequestrator,* nor is there a right of appeal. Quashed.

[*Why? The life estate was *unconverted*, and therein the case differs from *Bank vs. Stouffer*. Are the acts of Assembly directing the appointment of sequestrators, where life estates are taken in execution, repealed?—*Ed. Law Jour.*]

Supreme Court of Pennsylvania.

KAUFFMAN, *Plaintiff in Error*, vs. OLIVER, *et. al.*

ERROR TO CUMBERLAND COUNTY.

1. The Pennsylvania Courts are interdicted from assuming a voluntary jurisdiction to aid the master in recovering a fugitive slave, under the act of Congress of 1793, since the Pennsylvania act of 1826 has been repudiated and thrown out of Court by the Supreme Court of the United States.

2. The State Courts have no jurisdiction, either of actions for the penalty or for trespass, under the act of Congress of 1793, relative to the surrender of fugitive slaves.

3. The principles of the common law do not sustain any such actions in this State.

The Opinion of the Court was delivered by COULTER, J.

This action is instituted at common law, leans upon it for support, and invokes the aid of its principles to sustain its objects and result. The sweeping generality of the two counts in the declaration of the plaintiff, and the instruction of the Court, would leave room to infer that Kauffman, the defendant, had proceeded to the State of Maryland, and there seduced the alleged slaves from their servitude; brought them to the State of Pennsylvania, and there concealed them, so that the owner could not reclaim or recapture them. This mode of stating the case, throws around it some air of plausibility, although it makes no difference in the application of the law, which the judgment of the Court deems fit and suitable to control and decide. But the testimony does in nowise warrant, or authorize such general conclusions. Giving to it the most ample verge, it amounts to this and no more:—That the alleged slaves had been removed from Arkansas to the State of Maryland in February, 1846, from which State they escaped during the night, in October, 1847. John M. Stake, the relative of the plaintiff, below, their agent and witness, stated that he would rather have their value, than recapture the fugitives: two of whom were men, one with a stiff arm: two women, three boys, and the rest, amounting to thirteen in all, were girls; three of them at so tender an age, that the rest were obliged to carry them. Coal, a negro, and witness for the plaintiff, testifies that he found these persons in Chambersburg, and took them away as a friend, to help them along, and prevent them from being taken. They told him, as he testified, that they had been slaves in Maryland; that they were to be sold, *and that to prevent their sale, they made their escape.* He took them in the night to Shippensburg, from that to Miller's Furnace, and finally to Kauffman, and put them in his barn in the morning, and shut the door, and called Kauffman, who inquired what was the matter. Coal told him to come to the barn and he should see. When coal showed him the negroes in the barn, Kauffman told him to take them away, more than once; but finally agreed to let them stay till night, and agreed to give them something to eat. Coal then went to Butler, a negro, and gave his wife notice that he, Coal, wished to go home. That evening the negroes were hauled away in Kauffman's wagon; but to what place is not stated in the evidence. The wagon was returned in the night; who was the driver is not stated; but it appears not to have been Kauffman, who was standing at the end of the barn

when the wagon started. Several neighbors, having heard that negroes were there, went to see them; some were witnesses and others not.—Gutshall, a witness for the plaintiff, testified, on his cross examination, that John M. Stake offered him one hundred dollars if he would swear that Daniel Kauffman hauled the negroes away; and he said he didn't care a damn about the negroes if he could get Kauffman. This was said at Triagle Spring Tavern; Wm. Brown and Samuel Crabb were present.

These are the striking and almost the only merits of the case developed by the testimony, except some proof of ownership, and the sum and substance of the evidence. From it no glimmering of fact or circumstance is perceived to warrant a conclusion that Kauffman enticed the fugitives to run away, or that they were enticed to do so by any human being.—On the contrary, it appears from that evidence, as given on behalf of the plaintiff, that the negroes were prompted to fly at any hazard, by the fear of their being sold, and perhaps and almost inevitably to be separated—mothers from their children, and husbands from their wives and families forever. Prompted by the vast longings of the heart for kindred by nature, they were impelled to seek freedom, through danger and peril, rather than endure slavery among strangers and oppressors.

I waive all inquiry as to a point made on the record, to wit—whether the Court did not err by instructing the jury in the language, to wit:—“But if Kauffman was acting with others, in concert, who induced these negroes to escape from the service of the plaintiff, and his acts formed a link in the chain to accomplish that object successfully, then he is liable as if he had done all,” inasmuch as there is no evidence, as alleged by defendant, to warrant such instruction, I waive it, not because it is of little magnitude, but for a reason that I will state presently; and for the same reason I waive all observation upon the bills of exception taken to evidence by the defendant. I will observe, however, that the true question in this aspect of the case ought to be, and is, whether in the State of Pennsylvania a citizen who gives a cup of cold water and a morsel of bread to famishing women and children, and permits them to rest a few hours in his barn, when they are supplicants to his mercy, and even gives them a lift in his wagon, even if it should turn out that they are fugitives from slavery to freedom, does by that offer of mercy and compassion break the law, and make himself liable for their price in the *market* where men women and children are bought and sold—whether he is bound to let them perish on his own land, or drive them off to die on the land of his neighbor? Are they outcasts from the law of mercy and humanity, although they have within them that ray, if from Divinity, which we call a soul, and are sensible to hopes and fears, to agony and despair?

But we turn to another aspect of the case; one which presents a question which concerns the sovereignty of the State—the independence of its tribunals and the character of the common law—a question which overmasters all minor points presented on the record.

The defendant pleaded to the jurisdiction of the Court.

Pennsylvania reverently acknowledges and clings to the compact of union, as declared in the Constitution of the United States. Her bright escutcheon of good faith to that compact will never be soiled by her Courts or tarnished by her people. That constitution recognises slavery in the State under whose municipal and local regulations it exists. But at the time of its adoption, it was a compromise of conflicting interests, on many subjects, and none more emphatically so than on the subject of slavery. Then Pennsylvania was a free State. In 1780, the Legisla-

ture, in grateful commiseration of her then certain prospect of escaping from the house of bondage and the hand of the oppressor; and as the preamble to the act recites, "in consequence thereof being freed from the narrow prejudices which they had imbibed, and feeling their hearts enlarged with kindness and benevolence to men of all conditions and nations," abolished slavery within her borders as to all people thereafter born within her limits. From that time she has been deemed and taken as a free State, and as such assented to the compact of union.

Slavery, then, is recognized and enforced here by virtue of that compact alone. The voice of her own policy proclaims, so far shalt thou go, but no farther. The language of that compact is—"No person held to service in one State under the laws thereof, escaping into another, shall in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on the claim of the party to whom such service or labor may be due." Upon claim made by the person to whom service is due, the fugitive shall be delivered up. To whom shall this claim be made? Undoubtedly to the person or persons who shall have the alleged slave in custody, or who shall attempt to protect him from the owner to whom the services are due. And as by the compact, the slave is not discharged from his service by escaping into a free State, the owner or his authorized agent may pursue and take him, without riot or breach of the peace, by mancaption or reprisal, in any place where the compact is obligatory, just in the same manner as if the recaption was in the slave territory. Sovereignty is so far yielded by the free States, and so far the constitutional provision executes itself. But if the fugitive is harbored, protected, concealed, or enticed by any persons, the owner must make the claim in a legal manner and by legal process, according to the constitution and the laws of the United States. The mode, manner and circumstance of such claims are fully set forth in the act of Congress of 1793, and the means of making such claims effectual are therein provided.

Congress have regarded this claim, to the service of the fugitive, as a right of property, and that is the only light in which it can be viewed, and which must be made by one person or persons against another person or persons, and properly to be asserted in a court of justice. It is, therefore, a controversy between parties, arising under the constitution and laws of the United States, and must be referred to the forum having jurisdiction of such controversies. The Constitution of the United States declares that the judicial power of the courts of the United States shall extend to all cases in law and equity, arising under the constitution and laws of the United States, &c. This cause of action, good or bad, is within the jurisdiction of the United States courts, for Congress have power to pass all laws necessary to make the claim efficacious and commensurate with the constitutional provision. But it must be done through the courts over which Congress have power, and through their instrumentality; otherwise the claim might be rendered abortive, by the decisions of the State courts, pursuing their own local policy. The claim ought, primarily, to be asserted in courts whose decisions should conclude the subject of dispute, and not in a foreign forum, adverse to the whole process; if it pursues the feelings and policy of its own laws, and the principle of the common law. The provisions of the act of Congress must be pursued in the tribunals of the United States. Then they meet with no warfare by local legislation, or municipal peculiarities. And the person claiming the services of the fugitive is in the forum of that sovereignty and jurisdiction under which his claim is made. Within the terms of the compact, and

within the act of Congress, we acknowledge the validity of the claim when made in the proper forum. But outside the compact we breathe more freely. We feel the genial influence of the common law on this subject. The principle sprung fresh and beautiful and perfect from the mind of Lord Mansfield, in the great case of the negro *Somerset*, that by the common law, a slave, or whatever country or color, the moment he was on English ground, became free—endued with sanctity of reason. This case was decided before the Revolution, and became the common law of this State, always, saving and excepting the inroad of the compact and compromise. This action, then, professes to be founded on the principles of the common law. But by the principles of that law, the fugitives were free the moment when they touched the soil of Pennsylvania. All the incidents, accompaniments, and attributes of bondage fell from around them. By that law, even persuading the fugitives to fly, would be no offence in Pennsylvania, whatever it might be in Maryland. But the act of Congress in the 3d section, which specifies the acts for which damages may be recovered, and the penalty incurred, does not mention that of inciting negroes to run away; and we must gather the merit and intent of the legislative power, as well from what they do not say, as from that which they do say.

It was ruled in the Circuit Court of the United States for the district of Ohio, that if a slave escape to a free State, he is free according to the principles of the common law, and re-capture in a free State is justified only by the compact, in the constitution, and the act of Congress. And it was told in the same case that damages for harboring and concealing a slave in a free State are not recoverable at the common law. *Vanzandt vs. Jones*, 2d McLean, 596. It was also ruled in the same cause, that the saving in the 4th section of the act of Congress, of the owner's right of action covered merely the same ground as that embraced by the acts for which the penalty is inflicted: that is, that the owner should be entitled to his action for damages, on account of the same acts for which the penalty is inflicted, but of course in the same forum.

So that the plaintiff here is unaided by that provision upon which he placed some reliance. The damages are for the same injuries, arise under the same law as the penalty; and the action for the penalty might as well be mentioned at the common law, as the action for the damages.—Neither can be maintained outside of the act of Congress. I admit that a free State, although not bound to enforce in its tribunals the slavery of another sovereignty, and thus render itself subservient to the policy of another State, in opposition to its own; yet it may do so if it will. But it will be a matter of capacity, and not as a matter of right or duty.

In the year 1826, the Legislature of this State, for the purpose of aiding in the accomplishment of the compact to deliver fugitives when claimed, passed an act, enjoining upon State Magistrates and Judges the duty of acting, and prescribing the manner in which the duty should be discharged. This act of capacity was conceived in a just and fraternal spirit; only throwing around the fugitive some safeguards to prevent kidnapping under color of law. This act, however, was declared unconstitutional, by the Supreme Court of the United States, in the case of *Prigg vs. the Com'th of Pennsylvania*, [18 Peters, 593,] in which case it was resolved that the act was null and void—that Congress possesses the exclusive right to legislate on the subject, and that State Legislatures have no right whatsoever. In short, it is fully held, that the power of Congress is adequate to all the emergencies of the subject, and if it has not fulfilled them, it may, and perhaps will. This is the supreme law of the

land on the subject. State Legislatures are bidden back, as intruding into forbidden places. But it is intimated that although State magistrates and judges are not compelled, that nevertheless they may act, if it is not contrary to the policy of the State. On this point, there is some diversity among the judges, but I have stated the opinion of the majority. Very well, so let it be. The policy of this State is indicated in the act of 1780, in the act of 1826, and in the feeling and principles and government of State.

Under these circumstances, our Courts are interdicted from assuming a voluntary jurisdiction, since the act of 1826 has been repudiated and thrown out of Court, as the decisions of our tribunals might, and perhaps would be, against the claim of the owner of the fugitives. After full consideration, this Court is of opinion, that an action of this kind can only be sustained under the act of Congress of 1793.

That our State Courts have not jurisdiction of actions under the statute.

And the principles of the common law do not sustain any such action in this State.

The plea to the jurisdiction is therefore sustained, and the judgment of the Court of Common Pleas of Cumberland county, for \$2000, is reversed.

New Publications.

STATE TRIALS OF THE UNITED STATES during the Administrations of Washington and Adams. With references, Historical and Professional, and preliminary notes on the politics of the times. By Francis Wharton, author of a Treatise on American Criminal Law. Philadelphia: Carey & Hart, 126 Chesnut street.

Mr. Wharton is well known as the author of more than one excellent work on the practice of law. This is, we believe, his first essay on a subject which, in spite of the title, belongs as much to the literature as to the more practical branches of the profession. The main object of the work appears to be to place within the reach of the general reader those important trials, which, occurring immediately after the revolution, and growing out of and essentially connected with the struggles for mastery of the two great parties which then divided the country, have come down to us, in name, as familiar as household words, but we fear to most of us from the inaccessibility of the reported cases, familiar in name alone.*—The trials of Henfield and Guinet, of Cobbett, Matthew Lyon, Duane, Callender and Jonathan Robbins, and above all those of the Western Insurgents, (the whiskey insurrection,) and of the Northampton Insurgents, possess a historical interest, entirely independent of the great constitutional questions discussed therein, rendering "the State Trials" not only invaluable to the scientific lawyer, but attractive in the highest degree equally to the politician and the man of quiet literary taste.

From the preliminary notes in which Mr. Wharton, the author, with strong democratic leanings, but boldly, and, as appears to us, impartially reviews the prominent events connected with the Administrations of Presidents Washington and Adams, and presents brief and spirited biographies of many of the eminent men of those days, we have made the following

* The only correct copy of Callender's Trial, heretofore known of by us, is that in possession of Peter Force, Esq., of Washington.

extract. Mr. Wharton, in commenting on the partizan character of an eminent Judge, remarks :—

“The Judges and eminently so those of the Federal Supreme Court, are not only the construers of all laws, whether established by treaty or legislation, but the arbiters of their constitutionality; and to commit to them the office of interpreting the laws they themselves make, or of making the laws they themselves interpret, is a consolidation of power inconsistent with the genius of a government whose great felicity it is that it is the government of reciprocal checks. A Judge who becomes a statesman, is in some danger of becoming a partizan, and, though neither of the three eminent men who first took the disease, received it in its worst type, yet in those of their associates to whom they communicated it, it raged with malign vivacity. At the beginning of August, 1800, Judge Chase left the bench to stump the State of Maryland, on behalf of the existing administration, and the result was that the Court, the Chief Justice being then on the French mission, was left for a whole term without a quorum. There was not a charge to a Grand Jury that was not at the same time a party harangue, differing in the several cases it is true, in intensity, but the same in design; and even the guilt of a criminal was sometimes tested as much by the dogmas of the politician as the rules of the Judge. The State Courts, of course, did not hesitate to follow this august example. Of six Presidential Electors chosen that year in New Hampshire, three were members of the Supreme Judicial Court, and one of them thought proper to select the opening of a term as the occasion for the personal castigation of a political opponent. In Vermont, one of the county Judges became so strongly impregnated with what Mr. Ames might have called the French effluvium, as to sit on the bench in a liberty cap. In Massachusetts, the Chief Justice, in a charge to a Grand Jury, denounced “the French system mongers, from the quintumvirate of Paris to the Vice President and minority of Congress, as apostles of Atheism and anarchy, bloodshed and plunder.” In New York, Judge Cooper broke up an election by threatening to commit any body who challenged voters favorable to his own way of thinking, and even Chancellor Livingston sullied his brilliant name by a system of political agitation so daring as to gain the motto which afterwards clung to the capable and ambitious family of which he was the head,

— Rem, facias rem,
Si possis recte, si non, facias rem.

That the same vice ran through the New Jersey Courts, appears from a very able pamphlet now extinct, published by a learned jurist of that State; and even the fine judicial parts of the Chief Justice of Pennsylvania were marred by a partisanship as undisguised as it was efficient. It is not necessary to go further South, to show that the Courts of the States did not hesitate to adopt in its fullest development, the system of political judicialism promulgated by the Supreme Bench of the Union.” *State Trials*, 46.

We should like to give some extracts from the notices of John Adams, Wm. Lewis, and from Peter Porcupine and *The Aurora*, but we fear to tax the patience of our readers further. Enough has been said to indicate the character of the work, and we trust that many of our readers, in and out of the profession, will possess themselves of it, as an acquisition highly interesting as well as useful.

A DIGEST OF THE LAW OF REAL PROPERTY, by William Cruise, Esq., Barrister at Law. Revised and considerably enlarged by Henry Hopley White, Esq., Barrister at Law, of the Middle Temple. Further revised and abridged, with additions and notes for the use of American students. By Simon Greenleaf, LL. D. Emeritus professor of Law in Harvard University. In seven volumes. Volumes 1 and 2. Bos-

ton : Charles C. Little & James Brown. London : Stevens & Norton, 194 Fleet street. MDCCCXLIX.

This book which has been announced for some time is now in the hands of the profession. We have turned over the pages of the first volume with like interest and satisfaction. The clumsy real estate books of the olden student have long been resorted to rather as fountains of learning, by way of illustration and authority, than as hand books for the profession. Few things perplex learning more than the abstruse difficult and recondite learning of the law of real estate.

The elegant explanations of Mr. Justice Blackstone, in his second book of the Commentaries, gave indeed to the students of his own and of our times great advantage over the preceding generation of lawyers but it remained for Mr. Cruise, one of the very best real property lawyers of a day prolific in such men, to discharge his debt to the profession by the production of a book as yet unequalled, and which in the hands of the very competent American editor has become a legal classic on this as well as on the other side of the atlantic. Mr. Cruise's book was first published at London in 1804, in six volumes, and was at the time the most complete and comprehensive treatise on the law of real property. It was remarkable for its systematic analysis, copious collection and abridgment of cases, and at that time came into general use in England. In 1818, a second edition was printed in seven volumes. In 1824, a third edition, in six volumes was published, and in 1835, Mr. Henry Hopley White edited his edition, being the fourth, to which much additional matter was added, some errors corrected, and many notes and references to cases and statutes supplied, and it is from this edition that the present American one is reprinted. There have been four English and five American American editions. The second and third American editions were edited by E. D. Ingraham, Esq., of Philadelphia, and the fourth by F. Huntington, Esq., of Connecticut. Until the publication of the third and fourth volumes of Chancellor Kent's Commentaries, Cruise's Digest was the usual text book in connexion with Blackstone and Coke. It still retains a place among the best works on real property in both countries.

It is known to the profession very generally that the learned editor of this American edition of Cruise, Professor Greenleaf, has for many years filled the chair of the Royal Professor at the Dane Law School of Harvard University, at Cambridge, in Massachusetts; and many who will read this notice have enjoyed the rare advantage of his concise, exact and thorough teachings. By the catalogues it appears more than *one thousand* lawyers have received their degree of L. L. B. at this ancient seat of learning during the time the learned professor filled the duties of a teacher. These men some of whom are now advancing into the meridian of life, are scattered throughout the entire length and breadth of this now widely extended and extending country, in every State and Territory of the Union. To these men (the Professor's pupils) are the profession indebted for the American notes to this book. In these notes may be found the gathered and treasured training of many years of careful research made while teaching Mr. Cruise's work as a text book to the classes. Perhaps there is no where to be found a body of notes more nicely sifted, weighed and elaborated than is now presented to the profession. The analytical and severely logical character of the Professor's mind, is very familiar to the Law student from Greenleaf on Evidence, one of the safest works our shelves present, and which has extorted praise from the lips of Judges in Westminster Hall. This edition of Cruise fully shows that the profes-

sor is no less competent to annotate than to produce original works. We feel confident that no professional brother who has spent as many hours over the former imperfect editions of Cruise, as we have, will be willing any longer to endure his thumbed and dog-eared copy of 1824 or 1834, when he has within his reach these beautifully printed and admirably annotated volume.

We specially notice some of the annotations with a view of commending them, but almost any note of any length, will well repay a careful study. Of all the topics we think the title "Mortgage" deserves the greatest praise. It is indeed excellent. Throughout it is marked by extreme care and great closeness of thought and language. Many a toiling hard driven and worn brother of the bar will thank the editor for the subject-matter of the notes to this title; much labor, time and thought, will it save him.

It is among the pleasant things of our editorial life, that ever and anon we come to know a book, as it were after our own heart, which not to praise, or to praise coldly, would be equally unjust to our feelings, to our subscribers, and to the author. It cannot be expected that all books shall be equally well prepared; but when we find one that meets our own views fully, we rejoice greatly and hasten to make known to our readers the treasure. Such a book is Professor Greenleaf's edition of Cruise on the Law of Real Property.

TREATISE ON THE LAW OF CARRIERS OF GOODS AND PASSENGERS BY LAND AND BY WATER. By Joseph K. Angell. Boston: Little & Brown. London: Stevens & Norton. 1849.

Mr. Angell is the Reporter to the Supreme Court of Rhode Island, and has long had a distinguished reputation as the author of several treatise on the Law of Water Courses, on Limitations, on Tide-Waters and on Corporations, in the latter of which he was associated with Mr. Samuel Ames, also of this city. All of them are works of high authority in the legal profession, and they are frequently referred to in all parts of the United States, and have been highly commended by eminent jurists in England.

The present treatise on the Law of Carriers is probably more elaborate than either of the author's preceding works, and both on account of the nature of the subject to which it relates and the thorough research and learning which it displays, it cannot fail to be welcomed as a valuable accession to the legal literature of the age. The Law of Carriers is a branch of the Law of Bailments, which has been so admirably treated in the beautiful essay of Sir William Jones, and more recently in the learned commentaries of the late Justice Story; and in its varied applications, it may safely be said to be connected with a greater number of our common social and industrial interests and rights, than any other branch of jurisprudence. In the present condition of society, it regulates an immense proportion of the daily traffic and labor which are going on among men, and it is becoming more important and complicated with every advancing step of civilization. Who is there that is not in some way interested in the labor, the fidelity and the responsibility of the large class of persons who in one sense or another are known as carriers on the land or on the water? Where is the man who does not almost daily entrust person or property—interests of great value and often life itself to the care and control of others for transportation.—*Prov. Journal.*

THE
AMERICAN LAW JOURNAL.

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AUGUST, 1849.  
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ASLSLEGER et. al. vs. ERB et. al.

IN EQUITY IN BALTIMORE COUNTY COURT.

1. A peremptory mandamus must follow the nature of the alternative writ, and the latter cannot be amended on the hearing so as to warrant the award of a peremptory writ substantially different from the alternative one.

2. Where several persons have been removed from offices, in a corporation, they cannot join in one writ of mandamus to be restored.

3. Adultery and bigamy constitute ground of removal from membership of a Religious Corporation. A conviction, by the corporation, upon notice and hearing, is sufficient without a previous conviction in the criminal courts.

4. The admissions of the party are sufficient evidence to justify a conviction of the offences of bigamy and adultery, and removal from membership therefor.

5. The powers of Religious Corporations and the remedies against their abuse.

The opinion was delivered by the Hon. J. C. LE GRAND.

The bill filed in this case states that about the year 1770, a congregation for religious worship in the German language was formed in this city; and that said congregation continued to carry out its religious purposes under

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appropriate discipline and regulations (which in the year 1785 were embodied in a constitution) until the year 1797, when said congregation was incorporated by act of the Legislature, by the name of "The Elders, Trustees, and Members of the German Evangelical Reformed Church in the city of Baltimore." That by said act four persons are to be appointed Elders, and four persons Trustees of said congregation, who, in conjunction with the Minister of the congregation, as their president, are charged with the management of all the concerns of the congregation in its temporal affairs:—that Erb was in January, 1842, elected minister of the congregation, and complainants Aslsleger, John Smith, Lewis Weis and George Kraft, were duly elected Elders of the congregation, and one Jacob Gresle, and one Frederick Kraft, and the complainants, William Raine and John Schmidt, Jr., were duly elected the Trustees of the congregation. That the said congregation owns a large real estate, which, by its constitution and charter is exclusively under the care and control of the Elders and Trustees, and of the Minister of said congregation as their president. The bill then charges that the defendant Erb excited discontents in the congregation, and by combining with certain members, at meetings of them, has brought about the adoption, by them, of resolutions dismissing such of the complainants as had been in January, 1842, elected Elders and Trustees, and the election in their places of certain of the defendants; and the bill charges these dismissions and appointments as "acts of usurpation and contrary to the charter of the congregation, in fraud of the rights and in violation of the good order of the said congregation." The bill also charges that the persons so appointed with the other Trustees have combined to exercise exclusive control over the property and affairs of the congregation, and to debar the complainants (those of them who had been elected Elders

and Trustees) the care and possession of the church and other property of the congregation ; that the said Elders and Trustees are thus "interrupted in the lawful guardianship and custody and control of the property and temporal interests of the congregation." The bill then prays

1. That Frederick Kraft and Jacob Gresle, and the persons combining with them, may be enjoined and prevented from in anywise interrupting the complainants (Elders and Trustees) in the exercise of their offices.

2. That the defendants who have been thus improperly appointed Elders and Trustees, may be prohibited and enjoined from attempting to act as Elders and Trustees.

3. That the defendants Erb, Kraft and Gresle, may be enjoined and prohibited, save only in conjunction with the complainants, (the Elders and Trustees,) from acting in supervision of the congregation and its temporal concerns.

To this bill an answer has been filed in which the election, as stated in the bill, of some of the complainants as Elders and Trustees is admitted ; but all charges of usurpation and combination are denied, and the expulsion of some and the resignation of others of these complainants relied upon, as acts done under circumstances, which vacated the offices they held, and authorized the appointment of some of the defendants in their stead. To this answer a general replication was filed, and the case brought to an issue. To support the averments of the bill and answer an immense body of testimony has been taken.

This is an outline of the character of this proceeding,—a proceeding giving rise to a great number of important questions, all of which have been discussed by the counsel engaged in the cause, with a rare ability and a prodigality of learning. The character of the controversy, the importance of the interests and principles involved in its decision, no less than a proper sense of duty, have demanded of me, a full, patient and thorough examination

of all the arguments and suggestions which have been addressed to my consideration ; this I have cheerfully given them. The first and controlling inquiry in the cause, is—*has this Court jurisdiction of such a case as is presented by the bill?* If this question be determined in the negative, then there is an end to the matter, so far as this Court is concerned. In the prosecution of this inquiry, the first thing to be ascertained is, the principle on which the jurisdiction of a Court of Equity rests. That principle is,—*that where a wrong is done, for which there is no plain, adequate, and complete remedy* in the Courts of Common Law, jurisdiction rests in Courts of Equity. 1 Story Eq. J. sec. 49. This principle will be found to pervade all the books on the subject ; and our own Court of Appeals in the case of *Adair v. Winchester* 7 Gill. & John. 114, and in the case of *Oliver v. Palmer & Hamilton*, 11 Gill & John. 443, fully recognize it as the true criterion by which to test the jurisdiction of a Court of Equity.

This being the principle, the question arises,—whether for such wrongs as are alleged in the bill, there is a plain, adequate, and complete remedy in the Courts of Common Law?

The examination which I have given the subject, has satisfied me that there is, a “plain, adequate and complete remedy in the courts of *law*, in this State ; and that that remedy is to be found in the writ of *mandamus*.”

In the case of *Rex v. Barker*, 3 Burr. 1266, Lord Mansfield, in speaking of writs of *Mandamus*, says,—“where there is a right to execute an office, perform a service, or exercise a franchise ; (more especially if it be in a matter of public concern or attended with profit,) and a *person is kept out of possession, or dispossessed of such right*, and has no other specific remedy, this court ought to assist by a *mandamus*.” This doctrine is commended for its precision by the late eminent Chief Justice Marshall, in the cele-

brated case of *Maybury v. Madison*, 1 Cranch 168, and is also recognized by the Court of Appeals in the case of *Runkel v. Winemiller*, 4 Harr. McH. 449. In his "General Practice," 791, Mr. Chitty observes, (as to the objects to be accomplished by this writ,) as follows: "as respects the rights to offices of a public nature, and the duties of certain officers and personages, standing in certain situations, the profession of the right on the one hand, and the observance of the duty on the other will be enforced by this writ of mandamus." So in the case of *Rex v. Blooer*, 2 Burrows 1045, Lord Mansfield said, "a mandamus to *restore* is the true specific remedy, where a person is wrongfully dispossessed of any office or function which draws after it temporal rights; in all cases where the established course of law has not provided a *specific* remedy by another form of proceeding."

From these authorities it would seem to be clear, that if any of the complainants be rightfully and legally entitled to "execute the offices of Elders and Trustees in this congregation, or to perform any service, (such as managing the temporal concerns of the congregation,) and are 'kept out of possession, or are dispossessed of such right,' that mandamus will restore them to their powers and privileges.

But it is contended that in such a case as this, mandamus will not lie, because the offices are filled by others by the color of right, and the case in 3 John. C. 79, is cited to sustain this view. There can be no doubt that this authority is directly to the point; but the doctrine maintained by it is not universally acknowledged as law. In the case of *Elisha Strong, &c.*, 20 Pick. 496, the court in considering the principle upheld by this case, says: notwithstanding the respectability and weight of this and other authorities cited, there certainly are very many the other way, of which the case of *Dews v. The Judges* of the

Sweet Springs District Court, 3 Hen. & Munf. 1, is one. Dews applied for a mandamus to the Judges, to admit him to the office of clerk. It was objected among other things that the office was already filled, and the only remedy was by a *quo warranto* against the incumbent. But all the Judges of the Supreme Court of Appeals of Virginia, agreed clearly that mandamus was the best remedy. See also 6 Dane 335, and the cases there cited. Mr. Dane, with whom we concur, says: "on the whole the authorities, English and American, are much in favor of the *mandamus*, especially the more modern cases."

In the case of the King v. The Rector and Church-Wardens of Birmingham, 7th Adolph. & Ellis 254, in which a rule had been obtained, calling upon the Rector and Church-Wardens of the Parish of Birmingham, to shew cause why a mandamus should not issue commanding them to convene a meeting in vestry of the inhabitants for the election of Church-Wardens for the remainder of the year, it being alleged that certain persons had been improperly declared to be elected Church-Wardens, it was urged, that a mandamus to elect could not be the proper remedy, because the office was full *de facto*, and the case of Rex. v. The Mayor of Oxford, (6 Adolph. & Ellis, 349,) and the case of Rex. v. The Mayor of Winchester, (7 Adolph. & Ellis, 215,) were relied upon in support of this view. It was held by the Court that a mandamus would lie, and Littledale, J., in concurring with the Chief Justice, said: "There is a doubt whether these Church-Wardens were properly elected; and I see no other mode in which we can proceed than to grant the rule for a mandamus;" and in referring to the two cases cited in answer to the rule, he observed, that in those cases *quo warranto* lay, but *that in this case it did not*.

† In the case of The Queen v. The Mayor, &c., of Leeds (11 Adolph. & Ellis, 512,) the same doctrine was

held, to wit : that where what was done was merely void and the proceedings colorable, a mandamus would lie. So in Angell & Ames, on corporations, 565, it is said, "though the office be full, if *quo warranto* does not lie, a mandamus will be granted ; otherwise, in many cases, the applicant would be without remedy." Apart then from the authority of the case, in 20 Pick. 496, and those in 6 Dane 335, the rule as at present recognized in England, and as stated by Angell & Ames, seems to be this : that where there is a doubt whether the office is properly filled and a *quo warranto* would not lie, a mandamus will.— Keeping this principle in view, there will be no difficulty in reconciling the case in 3 John. 79, with the current of the more modern authorities, for in that case the mandamus was refused on the ground that a *quo warranto* was the remedy in the first instance. Now, the decision may or may not have been made on the principles of the Common Law, for it was justified by the *statute* laws of New York, 2 R. S. 581, sec. 28. Whether the Court, therefore refused the mandamus because of the provisions of the statute, it is impossible from the report of the case to determine. But whether it rested for support on the common law or on the statute, is, in my judgment, wholly immaterial so far as this case is concerned, for it is evident from the report of the case that if in the opinion of the Court *quo warranto* did not lie, mandamus would ; and this is in conformity with the doctrine laid down in Angell and Ames, 565.

If this be so, then the question arises, does the remedy of *quo warranto*, in such a case as this, lie in this state ? In the report of Chancellor Kelty, on the English statutes, he remarks on the act of 9th Anne ch. 20 : ("an act for rendering the proceedings upon writs of mandamus, and informations in the nature of a *quo warranto*, more speedy and effectual ; and for the more easy trying and deter-

mining the rights of offices and franchises in corporations and boroughs,") "this statute has been considered in force as to writs of mandamus, and is proper to be continued. As to writs of *quo warranto*, or informations in the nature of them, they have not been in use from anything that I can discover." And in the case of *The Regents of the University of Md. vs. Williams*, 9 Gill. & John. 365, the Court of Appeals consider the use of the remedy *quo warranto* only to be authorized by the Legislature. This being so, it is clear that no such remedy can be looked upon as in use in this State.

But, if such a remedy was in use in Maryland, I cannot perceive how the fact would be of any service to the complainants here, for a *quo warranto* is no less a *legal remedy* than is a mandamus; and if under the authority of the case in 8 John. 79, it be, in the first instance, the proper remedy in such a case as this, the jurisdiction of this Court is just as much denied, by the principle heretofore stated, as though mandamus would lie.

But for such a case as this (apart from the principles of the common law,) mandamus, in this State, is, to my mind, clearly the proper remedy. By the mandamus section of the act of 9th Anne ch. 20, this writ was *only* applicable to municipal corporations; but by the act of Assembly of Maryland, passed at December session, 1828, ch. 78, it is applicable to *all* corporations whose charters were granted by the Legislature, be they public or private. By a reference to the preamble of our act it will be found also that the writ is intended to subserve many of the purposes, for which, under the act of 9th Anne ch. 20, the writ of *quo warranto* could be invoked.

The preamble recites that "Whereas, divers charters have been granted by the authority of this Legislature, and divers persons have taken upon themselves, or may hereafter take upon themselves, to execute offices under

the same ; and where such offices are annual, it hath been, or may be found impracticable, by the laws now in force, to bring to trial and determine the right of such persons to such offices, or any matter or thing touching the conduct or agency of such persons within the year ; and where such offices are not annual, it hath been, or may be, difficult to try and determine the right of such persons to such offices before they have done divers acts injurious, &c. ; And whereas, *divers persons, who had, or may have, a right to such offices, have been, or may be, illegally ousted, or have been, or may be, refused to be admitted thereto ;* And whereas, the only remedy in such cases may be *by writ or writs of mandamus,*" &c. ; and the 1st section of the act then provides that the return shall be made to the *first* writ of mandamus ; and the second section extends the writ to all cases of "*intrusion, or usurpation, or of any breach or violation of any of the terms, conditions, privileges or franchises, or unlawfully holding of any of the said offices of, or in, or under any charter or incorporation, granted by this State.*"

Now, what are the wrongs complained of in this bill of complaint ? They are :—

1. That by an illegal exercise of authority the complainants have been dispossessed of the exercise of their rights and privileges as Elders and Trustees.

2. That they are debarred the possession of the property of the congregation, and a participation in the control of its temporal concerns.

3. That the acts of defendants, in the premises, are acts of usurpation.

If any doubt can exist as to the efficacy of a mandamus in such a case, independently of our statute of 1828, since the passage of that act, all doubt ought to be removed, for its second section makes the writ applicable to all cases of "*intrusion or usurpation, or of any breach or violation*

of any of the *terms, conditions, privileges or franchises*, or *unlawfully holding of any of the said offices*, of or in, or under *any charter* or incorporation, granted by this State." To my apprehension language could not be more explicit or more comprehensive.

But, it is said, on behalf of complainants, that admitting mandamus to lie in such a case, still, equity will entertain jurisdiction; and in support of this doctrine several cases have been cited in argument. A careful examination of these cases will not, in my judgment, discover the assertion of any such principle. In all of them, jurisdiction rested in a Court of Equity, because the subject of inquiry was a matter of trust; a subject at all times, peculiarly if not exclusively cognizable in a Court of Equity; or because of the praying of an account of trustees, or because of some *anticipated* wrong from the exercise of official power, matters also within the jurisdiction of Chancery. Thus in the case of *The Attorney General vs. The Earl of Clarendon, 17th Vesey, jr., 491*, which was an information having three objects:—1. The removal of such of the Governors of Harrow School as had not been duly elected. 2. The better administration of the revenues of the charity. 3. An alteration in the constitution of the school. The master of the Rolls, although recognizing the principle that corporations, constituted trustees, had sometimes been, by the decrees of the Court, divested of their *trust* for an abuse of it, as any *other trustees* would have been, nevertheless denies the doctrine insisted on by counsel for the complainants. In considering the first object sought to be accomplished by the information, he remarks;—The 1st of these objects is prayed upon the ground of those Governors not having been inhabitants of the parish at the time of the election. By the letters patent of Queen Elizabeth, the Governors are constituted a body corporate. *This Court, I apprehend, has no jurisdic-*

tion with regard either to the election or the amotion of corporators of any description."

Now let us look at this doctrine in connection with the case before this Court. By the act of the General Assembly of 1792, ch. 52, certain persons, and the then members of "The German Evangelical Reformed Church," and *those that thereafter might become members of the congregation, were made a body corporate.* The complainants, if not in their bill, do by their counsel, insist that by the proceedings in the cause, it is shown that certain of the defendants have been improperly elected to offices of this body corporate, and they ask, virtually, that the illegality and impropriety of these elections shall be declared by this Court. What is the answer to this demand as furnished by the case in 17th Vesey? It is,—this Court has "*no jurisdiction with regard either to the election or the amotion of corporators of any description.*" So far, therefore, from the case being to the point, for which it was cited, it is directly against it. So is that of *The Attorney General vs. The Utica Insurance Co.*, 2 John. C. 388. In that case the Chancellor says: "The plain state of the case, then is, that an information is here filed by the Attorney General to redress and restrain, by injunction, the usurpation of a franchise, which if true, amounts to a breach of law and of public policy. I may," he continues, "say, that such a prosecution is without precedent in this Court, but it is supported by a thousand precedents in the Courts of law. How, then, can I hesitate on the question of jurisdiction."

The case of the *Attorney General vs. Pearson*, 3 Merivale 353, was clearly a case in which the interposition of equity was invoked for the proper administration of a *trust*. It was the case of property vested in trustees, and declarations of trust thereof were duly executed by such trustees for sustaining a place of worship for dissenters ;

and the Lord Chancellor held that Chancery was bound to administer such a trust as it would be bound to do any other trust. The case of *Leslie and others v. Birnie* 3 Eng. Cond. C. Rep. 45, was also considered as one involving the due administration of a trust, and so declared by the Lord Chancellor ; and the case of *Milligan vs. Mitchell*, 7 Cond. Ch. Rep. 117, involved the consideration and construction of a trust created by lease : and so it will be found, also, that the case of the Attorney General *v. Newcomb*, 14 Vesey, jr., and the case of *Porter and others v. Clark and others*, 2 Cond. Ch. Rep 529, presented for the determination of the Court, questions touching the administration of a *trust*.

The case in 3 Paige 226, was simply a bill in which directors were called upon *to account* ; an object for which the powers of Chancery can always be invoked in matters of partnership, and the case was likened to such ; and in the case in 3 Paige 296, the Chancellor expressly said, if the only question was to whom the property belonged; he had no jurisdiction. But it is contended that the case of *Campbell & Voss vs. Poultney et. al.* 6 Gill. & John. 94, is affirmative of the jurisdiction of this court in the case now under consideration. That was a case in which equity was invoked to prevent an *anticipated* wrong, which, if not prevented by injunction, could not be remedied *after it was done* by a Court of Equity ; and it was on this ground that the Court of Appeals sustained the jurisdiction. But this is no such case ; it is emphatically one in which the thing that is wrong has been already done, and for which the remedy is at law ; if any anticipated wrong be sought to be prevented by an injunction, this Court is necessarily and unavoidably called upon from the nature of this case, to decide a matter over which it has no jurisdiction, namely, the election of and the amotion of certain Elders and Trustees of this corporation ; for, to use the

language of the court in the case of *Chambers vs. The Baptist Education Society*, 1 Monroe 215, "a Court of Chancery cannot inquire into an usurpation or misuse of powers, by the corporation or any of the trustees, nor into acts of misfeasance or nonfeasance, with the view to the amotion of any of its members, or the dissolution of the corporation. These are subjects *exclusively* of common law jurisdiction, and appertain exclusively to the common law tribunals." It was, however, argued by one of the counsel for the complainants, that the questions of election and amotion were not involved in the granting of the injunction prayed. In this opinion, I cannot concur; for how can this court undertake to enjoin certain persons from acting in a particular way without first inquiring whether they have the right so to act? and this inquiry certainly involves, as a necessary preliminary, that of whether the defendants were properly elected or not, for if they were, then the exercise of their official powers in the manner pointed out by the charter, constitution, and regulations of the corporation is authorized and cannot be enjoined.

Being of these opinions, it is not necessary that I should institute an inquiry into the election and dismissions of certain of the defendants and complainants; indeed this opinion, for the sake of the argument, is founded on the idea that the complainants were improperly removed, and the defendants improperly appointed, but that the remedy is *at law*. It is thereupon this 29th day of September, in the year eighteen hundred and forty-five, by Baltimore County Court, adjudged, ordered, and decreed, that the bill of complainants be and the same is hereby dismissed with costs.

Solicitors for complainants, Hon. Reverdy Johnson, Hon. Wm. Schley and Hon. Charles F. Mayer.

Solicitors for respondents, Attorney Gen. Richardson, J. V. C. McMahon and J. Meredith, Esqrs.

matter charged against Raine, independently of his desiring the exercise of it, as has been found by the jury. The offence charged against him had a double aspect,—first it was indictable by the laws the land; and secondly, it was against his duty as a member of a *religious* corporation. This being so, it was not necessary he should have been first convicted by a *jury*. 2 Binney, 448.

3rd. That although the return does not show, in *express terms*, he was *convicted* of the charge, yet it does show there was but one matter preferred against him, to wit: “the matter of his two wives;” that he was heard in his defence, and by the congregation after such hearing voted out. It shows the charge, defence and judgment, and therefore it is what is termed in the law a violent intention that he was convicted.

4th. That John Schmidt, jr., and Louis Weiss, resigned their respective offices, and their resignations were accepted.

5th. That George Kraft having joined the Methodist Episcopal Church, (although improperly removed,) has ceased to be a member of the German Evangelical Reformed Church, and is therefore incompetent, legally so, to hold an office of any character in this corporation.

6th. That John Schmidt, sr., and Frederick Aslsleger were improperly removed. Not because the congregation had no jurisdiction of the charges preferred against them, but because of the uncertainty of the proceeding against Schmidt, and because Aslsleger was tried and condemned with others who were charged with different offences.—His case ought to have been separately heard and decided. It is not apparent from the return on what ground Schmidt was removed—whether because of the charges made against him or because of his going away from the meeting saying he would have nothing more to do with them. If he was amoved for this declaration he was improperly

amoved, and it not being apparent on what ground he was removed, the Court is of opinion that his amotion was irregular and invalid.

7th. That in the case of the *death, resignation*, or disqualification of an Elder or Trustee, it is not necessary eight days should intervene between the nomination and the election of his successor. Without now deciding whether the language of the 5th section of the act of incorporation be merely directory or not, the 11th section of the same act, in my judgment, contemplates an entirely different case from that referred to in the 5th section. It provides—"that in the case of the death, resignation, or disqualification, of any Elder or Trustee, the body corporate shall, without delay, proceed to the election of another person in his place, whereof due notice shall be given to the members of the corporation."

The 5th section provides for the *annual* elections, whilst the 11th section provides only for extraordinary elections; and it is very doubtful to say the least of it, whether in proceeding *under it*, any nomination at all is required *before the day of election*. It provides that "due notice" of the time of the *election* shall be given, but nothing in regard to *nomination* is said. The "*body corporate*" (that is the Elders, Trustees and Members of the Church) shall "*without delay*" proceed to the election. Looking to the language of the section, and the object it contemplates, I am of opinion, the Legislature designed to confer on the body at large both the right of *nomination* and of *election* in the cases referred to in it.

By agreement of counsel for the respective parties the 12th and 13th issues have been submitted to the court for its decision.

It is clear beyond all doubt from the testimony of the witnesses examined under the commission, that Raine *admitted* he had a wife living in Germany and had one here

also by both of whom he had children; and also, that before the time he was married to the one in this country he had lived with her as his wife. This being so, and there being no evidence to show he had been divorced from his first wife, the only question is whether such admission is sufficient to establish the fact of adultery and the fact of bigamy? An examination of the authorities has fully satisfied me that such admissions are sufficient, and I accordingly find for respondents on both issues.—See 2 Greenleaf on Evidence 377, where it is said, on the trial of an indictment for polygamy or adultery, the declaration of the prisoner, that he was married to the alleged wife is admissible as sufficient evidence of the marriage, especially if the marriage was in another country. There are some authorities opposed to this doctrine, to wit: 7 John. 314 and 6 Connt. 446; but the great majority of them sustain the doctrine as laid down in the text of Greenleaf. See *Regina v. Upton*, 1 C. & Kir. 165, *Regina v. Simonsto*, 1 C. & Kir. 164, 7 Greenleaf 57, *Truman's case* 1 East. P. C. 470, 2 Wilson 339, 4 Burrows 2057.

With these opinions, in any possible event, a peremptory mandamus could only go to restore Schmidt, Senr., and Aslsleger. An examination, however, of the authorities, and a conference with my brother Judges, has satisfied them as well as myself, that no writ can go in this case. First—because the peremptory writ must follow the alternative writ, and the latter cannot be amended; and secondly, because more more than one person cannot have ONE writ of mandamus.

On the first point there are numerous cases, but the one of the *King v. The Mayor of Stafford*, 4 D. & East, 689, places the matter beyond all question. See also 1 Hill 55, 14 Law Library 224, and 211. In regard to the other question the authorities are equally numerous and

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explicit. Holt, C. J., in the case of *Andover 2 Salkeld 433*, said, 'five persons cannot have one writ of mandamus to be restored; for though the end of the writ is to do justice, yet the foundation is the wrong in turning them out, and the turning out of one is not the turning out of another; nor can several persons join in one action on the case for a false return.' The same doctrine is distinctly and unqualifiedly recognized as indisputable law in *2 Salkeld 436*, *1 Wm. Blac. Rep. 61*, *5 Mod. 11*, *12 Petersdorf 507*, *Selwyn N. P. 1090*, (last edition,) *12 Mod. 332*, *15 Viner's Abridg't., mandamus 210, (Q.) 8 Modern 209*.

There is nothing in our act of 1828 chapter 78, which changes this doctrine, and how absurd it may be considered, it is still the law of Maryland until the Legislature alters it.

There is nothing in the case of the Baptist Church decided by this court in conflict with this doctrine.

The question was not there raised, nor was there any peremptory mandamus issued.

As regards the order of this court to the clerk to issue the alternative writ, nothing can be deduced from it.

The order was in compliance with the prayer of the relators *who have the right to have the alternative writ issued as they may desire it*, they taking the *risk* of its being correct, which question is to be determined on the final hearing of the case.

Entertaining these views, the motion of relators must be overruled, and judgment entered up in favor of respondents on the verdict of the jury.

JOHN C. LEGRAND.

Supreme Court of Pennsylvania.

HARRISBURG, JUNE, 1849.

COMMONWEALTH FOR THE USE OF ANNA M. GEIGLEY'S ADMINISTRATOR *vs.* JOSEPH STOFFER, EXECUTOR OF WILLIAM GEIGLEY, DECEASED, WITH NOTICE.

1. Conditions in restraint of marriage, how far valid.
2. "A mistaken notion has been entertained that restraint of marriage, to be valid in a devise of land, must not be general."

[The facts of this case, and the decision of the Common Pleas of Lancaster County, will be found reported in 1 American Law Journal, p. 35. We think with Mr. Justice Kennedy, (1 Penn. Law Jour. 234,) that "even in regard to *real estate*, it is the universal opinion entertained by judicial men," that "*unqualified* restrictions on marriage are void." *Of course*, we think that the opinion of the Common Pleas is "the better opinion"—but that of the Supreme Court has the advantage of being more *authoritative*. It is therefore subjoined, that it may be implicitly submitted to in *Pennsylvania* as the decision of the highest authority; and may also receive such consideration as it deserves in *other States* where its authority may depend upon its conformity to sound public policy and to the principles of the Common Law.—*Ed. Am. Law Jour.*]

William Geigley died without issue, leaving a widow, father, mother, brother, and sister. His will, which was made on the 12th June, 1833, and proved in the month of October of the same year, contained *inter alia* the following clauses:

"I will and bequeath to my loving wife Susan Geigley all my real and personal estate that I am possessed of, (with a few exceptions that I will hereafter bequeath to my brother George, &c.,) *Provided* my wife Susan remains a widow during her life. But in case she should marry again, my will is she shall leave the premises and receive all the money and property she had of her own, or that I received of hers."

After several small legacies to other persons, the following clause appears:

"It is my will and desire, that if my wife remains a widow during her life on the premises, that after her death all the money and property that I got or had of my wife's shall be paid to her friends whomsoever she wills it to, and all the property belonging to me as my own at my death (not including my wife's part) I will and bequeath to my father and mother if living. But if they are both deceased, my will is that my brother Geo.

Geigley and my sister Catharine Geigley shall have the whole of that share or part that was my own, to them, their heirs and assigns forever."

The real estate was sold for the payment of debts under an order of the Orphans' Court, and the widow having married a second husband, the present action is brought by the representatives of the testator's mother (who survived her husband) to recover the balance of the proceeds of sale in the hands of the defendant.

GIBSON, C. J. This action is brought for surplus proceeds of land devised to the testator's widow for life; on condition not to marry; but sold by order of the Orphans' Court for payment of debts. She did marry shortly after the sale; and the question is, whether a subsequent condition in general restraint of marriage, when annexed to a devise of land, is void for reasons of public policy. When annexed to a legacy, the decisions of the Ecclesiastical Courts, followed in Chancery, have certainly established that it is; and so the rule is held in Pennsylvania, both at law and in equity, as is shown by *McIlvaine vs Gethen*, 3 Whart. 575, and *Hoops vs. Dundas*, determined a few months since at Philadelphia, but not yet reported. But it is said in 2 Powell on Dev. 282, that the rule of Ecclesiastical Courts in legatory cases, is inapplicable to devises of land, or money charged upon it; and that it owes its existence in any case to the Ecclesiastical Judges who borrowed most of their rules from the civil law. The same thing is reported in 2 Jarman on Wills, 836, and fortified by references to *Reeves vs. Herne*, 5 Vin. 393, pl. 46, *Harvey vs. Aston*, 1 Atk. 361, *Reynish vs. Martin*, 8 Atk. 350, *Stackpole vs. Beaumont*, 3 Ves. 96, and the cases collected in Mr. Saunder's note to *Harvey vs. Aston*, to which may be added the great case of *Fry vs. Porter*, 1 Mod. 308.

The ground on which these precedents stand, is the indisputable fact, that devises of land are governed not by

the Roman but by the Common law. Yet a mistaken notion has been entertained that restraint of marriage, to be valid in a devise of land, must not be general; but that would bring such a devise to the level of a bequest of chattels, and abolish the distinction between legacies and devises altogether. Yet the notion has received color from the very same text writers, in 2 Powell on Dev. 291, and Jarman on Wills, 843, who have asserted that even in regard to devises of land, it seems to be generally admitted (by whom?) that unqualified restrictions on marriage are void on grounds of public policy; though the point rests, they say, rather on principle than decision.

I know of no policy on which such a point could be rested except the policy which, for the sake of a division of labor, would make one man maintain the children begotten by another. It would be extremely difficult to say why a husband should not leave a homestead to his wife without being compelled to let her share it with a successor to his bed, and to use it as a nest to hatch a brood of strangers to his blood. Such is not the policy of the statute of wills, which allows a man to devise his land "at his own free will and pleasure;" nor is it the policy of the common law, which allows him to give his property on his own terms or not at all; and if he might not do the one he would assuredly not do the other: so that it is not easy to see how the cause of population would be promoted by binding his hands. To throw the widow of a landless merchant on her dower at the common law, would not do it. It may be the present policy of the country to encourage reproduction—though the time will certainly come when excess of population will be a terrific evil here, as it is elsewhere—but no political regulation which looks no farther than inducements to second marriage, will either advance or retard it.

It is therefore hard to discern the policy that has been

glanced at by the text writers. It may seem to them, as it did to the judge who ruled the cause below, that a condition in general restraint of marriage is contrary to an instinct of our nature which it would consequently be sinful to oppose. But the intercourse between the sexes is a legitimate subject of civil regulation ; for the land would be filled with violence and blood, if it were not. It would be impious, if it were possible, to suppress it ; but a gift on condition not to marry, leaves the donee free as air to do any thing at pleasure, but direct it to uses for which it was not intended. The truth is, the notion is the product of the Roman law, adopted as it was, with modifications by the Ecclesiastical Judges : and how far the Romans were drawn by waste of life in their ceaseless wars, civil, servile, and foreign, to force the growth of population by concubinage, as well as marriage, and by the imposition of a mulct upon celibacy, is a matter of school boy history. But that the rules thus borrowed, have not been eventually applied by the common law courts to land, is shown by *Goodright vs. Glazer*, 4 Burr. 2512, in which it was ruled that a prior uncanceled will is not revoked by a subsequent cancelled one ; a precedent followed by the court in *Flintham vs. Bradford*, which has not yet been reported. In *Harvey vs. Aston*, Com. Rep. 729, it was indeed intimated that the rule of the Ecclesiastical Courts in regard to conditions ought to be followed by the other courts for the sake of uniformity ; the absurdity of which was forcibly exposed by Lord Rosslyn, in *Stackpole vs. Beaumont*, 3 Ves. 89. " In deciding questions that arise in legacies out of land," said he, " the court very properly followed the rule which the common law prescribes and common sense supports, to hold the condition binding where it is not illegal. Where it is illegal, the condition would be rejected and the gift pure. When the rule came to be applied to personal estate, the court felt the diffi-

culty, upon the supposition that the Ecclesiastical Court had adopted a positive rule from the civil law upon legatory questions, and the inconvenience of proceeding by a different rule in the concurrent jurisdiction (it ought not to be called so,) in the resort to this court instead of the Ecclesiastical Court, upon legatory questions; which, after the restoration, was very frequent, and in the beginning embarrassed the court. Distinction upon distinction was taken to get out of the supposed difficulty. How it should ever have come to be a rule of decision in the Ecclesiastical Court, is impossible to be accounted for but on this circumstance, that in the unenlightened ages, soon after the revival of letters, there was a blind superstitious adherence to the text of the civil law. They never reasoned, but only looked into the books and transferred the rules, without weighing the circumstances, as positive rules to guide them. It is beyond imagination, except from that circumstance, how, in a christian country, they should have adopted the rule of the civil law with regard to conditions as to marriage."

So much for the support which the notion receives from principle; and now for the support which it receives from precedent. For the latter, we are referred to the supposed inclination of Lord Ellenborough's mind in *Perrin v. Lyon*, 9 East, 183, thought to be intimated by his remark on a condition not to marry a man of Scottish birth, that he "saw no ground to hold the condition to be void as being in general restraint of marriage;" whence an inference he would have done otherwise, though the gift was of realty, had the restraint not been special. He said no more, however, than that the limited terms of the condition relieved him from the necessity of deciding the broad question: from which no more can be inferred than that he may have thought it a debatable one. The *nisi prius* opinion of our late brother Kenedy, in *Middleton v.*

Rice, 6 Penn. L. Jour. 234, is more formidable, not only because of his great learning and experience, but because it furnishes the only direct authority for the notion that is to be found in the English or American books. But it is directly opposed by a solemn decision of this Court in *Bennet vs. Robinson*, 10 Watts 348. True, that was the case of a conditional limitation; but if it were contrary to the law of nature, it would be equally inoperative as a condition, either in respect to land or in respect to a legacy: it could not be good as to the one and bad as to the other. But whether the restraint be by limitation or condition, is in a majority of cases the effect of accident, depending on the turn of expression habitual to the scrivener, who seldom knows anything of a technical difference between them. If the rule of the Ecclesiastical Courts were applicable to land, it would be easily evaded by using words of limitation, instead of words of condition; and thus it would have no greater effect on devises in restraint of marriage than the statute of uses had on trusts which worked a change only in the words necessary to create them.

The difficulty in the application of the common law rule to the case before us, is the want of an entry to determine the widow's estate for the condition broken, which is generally necessary to divest a freehold, though not to divest a term for years. Here, however, an entry was impossible, for the land was sold before the widow's marriage. Had the condition been broken before the decree there might have been an actual entry, though perhaps even then it would not have been indispensable; but since it has been converted, her right to the money substituted for the land, is extinguished by the simple adverse claim of it.

Judgment reversed; and judgment rendered for the

Plaintiff for three hundred and thirty-four dollars and costs of suit.

Park and Hiester, for Plaintiff. McElroy, for Defendant.

United States District Court,

for the District of Iowa, January Term, A. D. 1849, Hon.
J. J. Dyer, presiding.

RUEL DAGGS vs. BLIHU FRAZER, et. al.

(Reported by W. Penn Clarke, for the Western Legal Observer.)

Trover will not lie in Iowa to recover the value of Slaves.

This was an action of *trover* against the defendants, nineteen citizens of Salem, Henry county, in this State.— The declaration contained three counts. The first count read as follows, to wit: “For that whereas the said plaintiff heretofore, to wit: “on the 1st day of May, A. D. 1848, (being at the time of the trespasses hereinafter alleged and set forth, a resident in and a citizen of Clark county, and State of Missouri, and still being, &c.) in the said county and State, to wit: at the township of Salem, in the county of Henry, and State of Iowa, and the District of Iowa, and within the jurisdiction of this Court, was lawfully possessed as of his own property of certain goods and chattels, to wit: “one negro man, commonly known and called by the name of Sam, and of the real name of Samuel Fuleher, and of the value of \$2000; one negro woman, of the name of Dorcas, the wife of the said Samuel Fulcher, a tanner by trade, and skilful therein,

and of the value of \$1000; one negro man of the name of John Walker, a skilful farmer and *tanner*, and of the value of \$2000; one negro woman of the name of Mary, the wife of the said John Walker, and of the value of \$1000; one other negro woman, of the name of Julia, of the value of \$1000; one female negro child of the name of Martha, and one male negro child of the name of William, each of the value of \$500; and two other male negro children, one aged three years, and one aged one year, and each of the value of \$500; consisting in all of nine negroes, the slaves of the said plaintiff, by and under the laws of the State of Missouri, and of the value in all of \$10,000.— And being so possessed thereof the said plaintiff, afterwards, to wit: “on the day and year first above mentioned, at, &c., casually lost the said goods and chattels out of his possession. And the same, afterwards, to wit: on &c. came to the possession of the said defendants by finding. Yet the said defendants, well knowing the said goods and chattels to be the property of the said plaintiff, and of right to belong and appertain to him, but contriving, &c., have not, as yet, delivered the said goods and chattels, or any or either of them, or any part thereof, to the said plaintiff, although often requested so to do; and afterwards, &c. converted and disposed of the said goods and chattels to their and each of their own use—to the damage of the plaintiff \$10,000, and therefore, he brings his suit.” &c.

The second count, the same in substance as the first.— The third count is for money laid out and expended in endeavoring to re-capture and recover the said goods and chattels, for loss of services of said negroes; for loss of crops, &c.

To this declaration, the defendants demurred, and assigned the following causes of demurrer:

1st. The said counts set forth and allege the said prop-

erty to be negroes, men and women, &c., whereas the laws and Constitution of Iowa do not recognize men and women as property, and the subject of a suit :

2d. The said declaration does not show that the plaintiff had any right to said persons in the State of Iowa :

3d. The action of trover will not lie to recover the value of human beings in the State of Iowa :

4th. There is no sufficient cause of action set forth in the plaintiff's declaration : and

5th. The said declaration does not state or show that said trover and conversion was contrary to the Act of Congress, in such cases made and provided.

J. C. Hall, and J. T. Morton, in support of the demurrer, contended :—

1. The subject matter of trover must be *property* in the strictest and most technical sense of the term, not only capable of conversion, but such in its character as to raise the presumption that the defendants knew the right of ownership to it was vested in others than themselves.

2. At Common Law, there is no remedy for interference with the rights of owner and slave. 7 Bacon's Abr. 606; 1 Blackstone Com. 435; 2 McLean, 601.

3. The Constitution and laws of Congress have changed this. To what extent? See U. S. Constitution, Art. 4, sec. 2; Act of Congress of 1793, sec. 3; 1 Laws U. S. 302; Jones vs. Vanzant, 2 McLean, 601.

4. From the above authorities, slaves, when in a free State, are *persons*, and not property. The only right of ownership they are then subject to is a compulsory specific performance. See Serg. Constitutional Law, 397.

5. The only interference with the rights of master and slave upon the soil of a free State, for which there is now a remedy, is one of the acts forbidden by the Act of Congress of 1793, sec. 4. Jones vs. Vanzant, 2 McLean, 604, 608, 626.

6. The action must be founded on the statute, and must so appear in the declaration. 1 Chitty's Pl. 246; 2 McLean, 604.

7. A recovery of the full value in trover vests the property in the defendants. In a free State, (the cause of action there arising) this must be otherwise, if slaves are the basis of the action. Therefore, by this conflict of laws, the plaintiff must be driven to some other remedy.

J. P. Carleton, S. Whicher, and A. W. Sweet, in reply, contended that the master has the same right to the slave into whatsoever State he may escape, that he had in the State whence he escaped; that this right is guaranteed by the Constitution and Laws of the United States, and by no other law; that it is not in the power of any State to change those rights. Consequently, the same form of action, and the same rules of evidence may be invoked and applied for an infraction of those rights that are given in Missouri. The idea of conversion may be entertained in law, without supposing benefit to accrue to the defendant in trover. The injury to the plaintiff, and not the benefit to the defendant, is the true rule of damages in trover.—That the defendant could not be benefited, under the laws of Iowa, by the wrongful act charged in the declaration, affords no good reason against the maintenance of the action of trover. That this being an action at Common Law, the same strictness in pleading is not required as would be in an action under the act of Congress for a penalty. See Jones vs. Vanzant, 2 McLean, 604; 2 Wheaton's Sel. note, 1417; Mahony vs. Ashton, 4 Harr. & Henry; Commonwealth v. Griffin, 7 Pickering; 2 Mason, 81; 9 Johns. 67; Prigg's case, 16 Pet. 1 Chit. Pl. 246.

By the Court.—The averments in the declaration are not sufficient to support the action. Trover will not lie in this State to recover the value of slaves.*

Demurrer sustained.

*See opinion of COULTER, J., 2 Amer. Law Journal. 41.

The plaintiff then asked leave to withdraw his joinder in demurrer, and amend his declaration in any manner not inconsistent with the writ, which was granted, and the cause continued at the costs of the plaintiff.

Supreme Court of Ohio, December 1848.

Nimmocks & Marshall vs. Madison Inks.—Error. KNOX. HITCHCOCK, J., held—1st. That in a declaration containing different counts, some sounding in contract and some in tort, there is a misjoinder, and for such cause the declaration will be held bad either on demurrer or in arrest of judgment. 2nd. That such defect is not cured by the second section of the act “to regulate the practice of the judicial courts,” passed March 12, 1844. Judgment affirmed.

Isaac Mitchell, Administrator, vs. Thomas Donaldson, et al.—Bill of Review. Clermont. AVERY, J., held—1st. That a mortgagor by making his debtor his executor, does not thereby extinguish the mortgage. 2nd. That an administrator *de bonis non*, with the will annexed, may institute proceedings in Chancery to foreclose the mortgage, making other mortgagees as well as the mortgagor, defendants in the suit. Decree of the Common Pleas reversed.

The Fund Commissioners of Muskingum. HITCHCOCK, J., held—1st. That in certifying the acknowledgment of a deed, nothing further is necessary than that the officer taking the acknowledgment shall “subscribe his name,” to the certificate. 2nd. That the statutory provisions on

this subject extend to notaries as well as to other officers. Decree for complainant.

Joshua Wagers vs. Samuel Dickey, et al.—Error. Harrison. BIRCHARD, C. J., held—1st. That the Supreme Court will not reverse the judgment of the Court of Common Pleas for error in refusing to grant a nonsuit, unless the bill of exceptions discloses all the testimony which was before the court on the motion for nonsuit. 2nd. That where a witness who has testified in a cause is dead, on a trial of the same cause between the same parties, another witness may testify as to the substance of what the deceased witness testified on the former trial. Judgment affirmed.

Mary Nolan vs. Samuel Ormston.—Bill of Review. Hamilton. READ, J., held—That a bill of Review may be filed within five years from the day on which the decree sought to be reversed was rendered: the time is to be counted from the day the decree is pronounced, not from the first day of the term. Plea overruled.

IMPORTANT DECISION.—The Supreme Court of New Jersey has decided that owners of cattle are bound to keep them off railroads. The decision was given in the case of Vandegrift vs. Rediker, which was an action of trespass brought against the engineer of a locomotive for running against and killing the plaintiff's cow. The cow was at large, and had strayed upon an unenclosed part of the C. & A. railroad, near Bordentown, just as the train, at its usual speed, was approaching. The railroad at the place of the accident, runs along side the public highway, and the view along the track, is unobstructed for a quar-

ter of a mile each way. The bell was tapped and the engine reversed a few seconds before the collision, but not in time to stop the cars. The engineer was proved to be a generally careful man in his business. The opinion of the Court was delivered at the present term by Mr. Justice CARPENTER, the result of which is, that the owner of cattle is bound to keep them on his own premises at his peril; that an engineer in charge of a locomotive is not liable for an accidental injury to a cow which, suffered to go at large, has strayed on a railroad; and that nothing but wilfulness on his part will make him liable for the loss of a cow so exposed by the fault of the owner.

The opinion at length will appear in our next.

Abstracts of Decisions of Supreme Court of Penn'a.

[Reported for the American Law Journal, by ALEXANDER JORDAN, Esq.]

SUNBURY, JULY, 1849.

Hoffman vs. Dawson. Error to C. P. of Lycoming County.—The Justices' transcript in this case showed that the parties appeared before the Justice. Plaintiff's book account was \$410 for services rendered, and work and labor done. A credit was entered at the time for \$310 50. Demand \$99 50, for which Justice gave judgment. Defendant appealed from the judgment. Plaintiff filed a declaration—1st count alleges defendant was entitled to \$300, 2d count \$100, 3d count \$100. The cause was arbitrated and an award in plaintiff's favor for \$21 72. The Attorney for defendant produced his set-off to plaintiff's account, exceeding \$100.

Want of jurisdiction in the Justice was the error complained of.

BURNSIDE, J. It is certainly not error to state the whole case on the Justices' docket. This tribunal is so useful to the country in settling such disputes, that it is our duty to construe all acts of the Legislature giving it jurisdiction, liberal and remedial. The sum claimed was under \$100, and we will not reverse because a declaration is filed for a greater sum than \$100, when the actual demand is within a Justices' jurisdiction.

Sneezy vs. Herr. Error to C. P. of Union County.—Action on case for deceit. *BURNSIDE, J.* The gist of this action is fraudulent misrepresentation. To recover, it must be shown that deceit was used to throw the plaintiff off his guard, and prevent his being watchful. That the defendant knew that the representations he made were false, and the plaintiff had acted upon those representations.

Ingersoll et. al. Trustees vs. Lewis. Error to C. P. of Tioga County.—*ROEAS, J.* An entry on land, as is ruled in *Altomus vs. Campbell*, 9 Watts 28, avoids the operation of the act of Limitations, if accompanied by an explicit declaration, or an act of notorious demise, by which the claimant challenges the right of the occupant. To show a person enters, *animus domandi*, as where he enters and surveys the land, it operates as a bar to the act of limitations, and where the intent with which he enters is made doubtful, the question of intent must be submitted to the jury.

Paxton vs. Hanier, with notice to Henninger, terre tenant. Error to C. P. of Columbia County.—Paxton sold to Hanier 447 acres of land, and on 5th May 1842, took a mortgage from Hanier for \$1100 of the purchase money. 1st June, 1842, Hanier conveyed by deed to Henninger the land, within certain metes and bounds, which the surveyor calculated contained 11 acres 118 perches, and was so stated in the deed. The real quantity, however, is 26 acres. Henninger agreed to pay \$5 per acre for each and every acre, strict measure; he paid only for the 11 acres 118 perches. The rest of the mortgaged premises were subsequently sold by Hanier for more than enough to pay off the mortgage to Paxton; and Paxton received from the purchasers respectively, such parts of the mortgage money as bore the same proportion to the whole debt, which the quantity and value of the parts of the land they purchased respectively bore to the whole land, and then released the parts so purchased from the lien of the mortgage, and the balance of the mortgage money now due, is only what the said 15 acres would amount to at \$5 per acre and interest from 1st June 1832. The plaintiff sued out a *scire facias* on the mortgage. The court below decided that plaintiff could not recover, and the Supreme Court affirmed the judgment. *ROEAS, J.*, delivered the opinion.

For vs. Cash. Error to C. P. of Bradford County.—*COULTER, J.*—The clerk to the Commissioners is not forbidden by the law to be a purchaser of a tract of land sold at public sale by the Commissioners for arrears of taxes. Nor is it so opposed to the policy of the law, as to make it iniquitous and void. The sale is open to all, except to the commissioners. The clerk is merely the scrivener, or ministerial agent of the Commissioners.

Baldy vs. Stratton. Error to C. P. of Columbia County. *ROEAS, J.* Although an action for breach of promise of marriage is an action on a

contract, yet the circumstances which attend its breach, before, at the time and after, may be given in evidence in aggravation of damages. This, I have never known to be disputed.

M' Coy's Executors vs. Murray. Error to C. P. of Northumberland County.—**COULTER, J.** A trustee may unquestionably recover from the *cestui que trust* in ejectment. Every vendor, until he has executed a deed, is considered in equity as trustee of the vendee, and he may enforce the contract by ejectment; and it would be *fair* to hear any plausible reason, why a man who has purchased and paid for land, for the benefit of another whom he allows to take possession, and who holds the legal title as security for the purchase money, should not, if the *cestui que trust* refused to pay the money, or set up title in himself, either by the statute of limitations or otherwise, be permitted to enforce the contract, and compel the delinquent to do justice, by the remedy of the action of ejectment. A conditional verdict is now well adapted and affiliated in our jurisprudence. It is an important adjunct and aid in our mode of administering and applying equitable principles, in relation to contracts and concerning lands.

Stewart, Administrator of Stewart vs. Stevenson. Error to C. P. of Lycoming county.—**BELL, J.** Great latitude is allowed to the reception of indirect, or as it is sometimes called, circumstantial evidence, the aid of which is constantly required, and therefore where direct evidence of the fact is wanting, the more the jury can see of the surrounding facts and circumstances, the more correct their judgment is likely to be.

The competency of a collateral fact, to be used as the basis of legitimate argument, is not to be determined by the conclusiveness of the inferences it may afford, in reference to the litigated fact. It is enough, if these may tend even in a slight degree to elucidate the inquiry or to assist, though remotely, to a determination, probably founded in truth.

In the case at bar, the question is if the alleged forgery of the defendant's signature to a promissory note, averred to have been given for money loaned. Such investigations, founded in imputed fraud, naturally take a wide range. Among the most common topics of inquiry, is the pecuniary capacity of the supposed lender, and the necessitous condition of the alleged borrower. And these inquiries are legitimate. It is competent for the defendant to shew the plaintiff was, at the time of the alleged lending, a poor man, and probably unable to loan the sum in question, or that the defendant was himself possessed of money, and therefore not driven to the necessity of using his credit.

Reanck vs. Reanck's Executors. Error to C. P. of Union County.—Opinion delivered by **BELL, J.** A deed or other instrument, absolute and unconditional on its face, may be controlled or otherwise defeated by a

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contemporaneous verbal understanding or a series of facts, constituting an adverse equity, where a recognition of these is necessary to defeat fraud.

Aurand's Appeal. Appeal from the decree of the Orphans' Court of Union County. Per Cur. A general creditor is neither a purchaser nor a judgment creditor within the provisions of the act of 1798, even though he may have obtained a judgment against the personal representative.—Such a judgment creates no lien, though when duly followed, it protects the lien acquired by the death against the heirs or their alienees, and preserves the right of participation in the general fund. But in relation to a judgment creditor, at the time of the death, a lien creditor, by force of the intestate laws, stands exactly as the decedent stood himself, and can no more disencumber the land of a judgment antecedent to the death, than he, were he living, could do it. General creditors became lien creditors at the death, but not judgment creditors within the meaning of the act, whether they obtain judgment against the personal representatives or not, and their liens hold only against the heirs or their alienees, and against each other, not against judgment creditors of the decedent or purchasers from him.

HARRISBURG, JULY, 1849.

[Reported for the American Law Journal, by PHILIP C. SEDGWICK, Esq.]

Franklin Ins. Co. vs. Smith for use.—Franklin. COULTER, J. *A cestui que trust* has a right to use the name of the trustee without his consent, and the Court will not allow him to interdict it, in all cases where the *cestui que trust* would be liable for costs.

The bye-laws of corporations which inhibit assignments of stock without the consent of the corporate officers, are solely to prevent secret transfers by holders indebted to the company. When a director of a company by a written form under seal, authorizes the treasurer or his attorney to transfer to Smith, for use of Nichols, and the treasurer made no objection, and entered on the books transferred as per paper filed, and transferred the paper to the book, and attested the entry as secretary, but signed no transfer as attorney, &c., it is sufficient to convey the absolute interest of the transferor to the transferee, as against other claimants. More glaring disregards of form occur oftentimes in transferring property by judgment and execution. The signature twice as attorney and secretary would be superfluous.

And when stock is so transferred as collateral security for a debt, it is not in the corporation to resist its efficiency, until the debt is established by judgment, and execution issued, to try to recover elsewhere. The intention of the parties is to prevail which is apparent, that until the debt is paid the stock with its dividends is to go to the creditors. Affirmed.

Greenwich Road.—Berks county. BURNSIDE, J. The road act of 1836, nor any act does not authorize the Court of Quarter Sessions to

vacate a public or private road, when *part of it only is opened*. Affirmed.

Seagrist's Appeal. Lebanon county. BURNSIDE, J. When the son-in-law of a testatrix owed money to an estate, for which bond was held, a part of which had been received on an assignment, and the expression in the will is "what I have given and advanced in my life time to any of my children shall be deducted from their several and respective shares," it was held that the money owed on the bond, was not an advancement to the wife. Affirmed.

Sabbatons & Wille's Estate. GIBSON, C. J. The regularity of a judgment cannot be enquired into in a process of distribution; and the allegation of collusion can be disposed of only on a collateral issue.

There is no lien allowed to mechanics and material men where the new building is merged in the old one, which has undergone no change of structure or identity. Here the new building is joined to the old one by an interior communication of motive power to the hammer, which the new one was intended to shelter; and from the general correspondence of the parts, appears to be no more than an erection to complete the general plan. It might have been made a distinct forge, but was not. It is only an addition. Reversed, &c.

Ruetter vs. Fidler. Berks. GIBSON, C. J. The private privileges of the pavement on a public square, where no disposition is made by ordinance for more than six feet from the curbstone, which is to be kept free, appertain as well to the side of a lot touching it, as to the front. At the angle there is a square which cannot be obstructed by either holder. Affirmed.

Newman vs. Rutherford. Dauphin. ROGERS, J. An agent of the Commonwealth who pays money to a contractor, which the contractor afterwards drew from the Treasury, may maintain an action for money had and received against the contractor, if the Commonwealth has not allowed it to the agent in his account.

The statute of limitations in such case does not begin to run from the time the agent paid the money, but from the time the contractor drew it a second time from the treasury. Affirmed.

Commonwealth for the use of Stub vs. Stub. Berks. ROGERS, J. The sureties in the bonds of executors and administrators do not become liable to either creditors, legatees or distributees, until by judgment in a common law suit, or by decree of the Orphans' Court, the executors or administrators are made personally liable.

And the rule will hold, though the bond sued on is not an original administration bond, but was given at the instance of the co-executor for his own safety. The true indebtedness of the principal must be fixed before the sureties can be sued. Affirmed.

Long vs. Mast. Berks. COLTHER, J. In case of privity of estate

the ouster of the party claiming, must be notorious, adverse and exclusive against the owner; must be against all persons, and in suberviency to none, to enable him to hold.

Here there was a mistake as to the duration of the interest, owing to the obscurity of the will. The possession of the life estate claimed on, was not in fact adverse to the remainder man. Affirmed.

Bieber's Appeal. Berks. BURNSIDE, J. One otherwise entitled to administer, is incompetent when it is alleged that he owes the estate, which he denies, and is in the situation of a litigant party in opposition to the estate. Affirmed.

Union Canal Company vs. Woodside, assignee of Brown. ROEHR, J. The assignee in bankruptcy issued a venire to assess damages done to his property more than two years after his certificate of discharge. Held that the 7th sec. of the bankrupt act is not a bar.

But when a venire was issued more than 20 years after the alleged injury, the jury might have presumed a satisfaction or abandonment. Affirmed.

Walker Township vs. West Buffalo. Centre. BURNSIDE, J. When a motion to quash an appeal, for mere matter of form, is made after the term to which the appeal is entered, it will be denied; especially when there is an act of the Legislature, as in this case, (poor laws,) requiring a decision on the *truth and merits*. So the motion will be denied, when a remedy by certiorari could be forthwith had.

A decree of the Supreme Court, though afterwards discovered to be erroneous, is in the nature of a former recovery, and will not be re-tried and re-formed. It is final. Special decree.

Commissioners of Franklin County vs. Rineman. BURNSIDE, J. The fee bill of 1821 has this item: "Advertising general election in addition to the printer's bill to be paid by the county, 75 cents." Held that the Sheriff who pays the printer's bill may recover it from the county.

The Supreme Court cannot decide whether the "Coon Killer" is a newspaper or not, within the meaning of the law—especially as it is in German. The jury have passed upon it. Nor is the politics of the paper, or the principles of the Sheriff, a matter to be determined upon, upon a writ of error. Affirmed.

Hendel vs. Woods. Cumberland. Per Cur. The testimony of one witness, that the defendant admitted he had cheated the plaintiff in the bargain for the horse, was evidence of confession, and sufficient if believed. It was something to be left to the jury. Affirmed.

Heffrich vs. Karcher. Berks. Per Cur. An execution creditor who does not interfere with the execution of the process is not answerable for the blunders of the officer. He is not a trespasser by the bare receipt of

the money from the constable, the proceeds of property not belonging to the defendant in the execution. The creditor does not necessarily direct the proceedings of the officer, who acts at his own peril, and by the directions of the writ. Reversed.

Shearer vs. Woodburn. Cumberland. BURNSIDE, J. Both titles in this case are shabby. The plaintiff claimed under a tax sale to Malin before the act of 1815. Malin never looked after his purchase. He also claimed under a recent sale for taxes, which Woodburn redeemed. The defendant claimed under Harper who paid the taxes for 25 years, and hooked the timber and bark. Held that Woodburn who purchased Harper's title at Sheriff's sale, was no stranger or volunteer in redeeming; and that although Harper said the land was Malin's, he did not thereby induce Shearer to purchase that title. As a plaintiff can only recover on the strength of his own title he cannot recover here. Affirmed.

Farmers' & Mechanics' Bank vs. Galbraith. Cumberland. GIBSON, C. J. The execution of a conveyance is the consummation of a purchase; after which the parties have no recourse to each other except for imposition or fraud. Here no deceit was alleged; the difference was produced by the mistake of the surveyor; and the mutual misapprehension is not ground to recall the contract which is past and gone. If the money paid could be recovered back now, it could be at any time within six years from the discovery of the mistake. 13 S. & R. 160. Reversed, &c.

Cumberland Valley R. R. Co. vs. Hughes. Franklin. BELL, J. An artificial, like a natural person, is liable in damages when he neglects a duty that by law he ought to perform and another is injured thereby; and in Pennsylvania an action in the case is the proper remedy.

A rail road company is responsible for the safety and sufficiency of the road and its appurtenances so long as toll is exacted; and it is only necessary to show an injury to person or property, sustained through the negligence of the company or its servants, to recover.

A general property in the thing injured is sufficient to sustain the action without actual possession of it. "This wholesome rule of liability for neglect ought, if a distinction in practice were permitted, to be most stringently enforced against rail road corporations whose slightest inattention to the duties they assume, may be, and frequently is attended with the most frightful results. The almost daily loss of life and property resulting from the indifference so often manifested by the agents of these companies, carries with it an admonition, that the public safety calls for a strict adherence to a rule suggested by policy and humanity. Affirmed.

Mishler's administrators vs. Mishler. Cumberland. Per Cur. A release by the second husband of the widow of an obligee in a bond, when the suit was brought by the administrator for the use of a son, who was

entitled to the whole proceeds, will not make her competent as a witness ; for she had an interest in increasing the assets of the deceased husband's estate. She was in the predicament of a bankrupt called to increase the fund. The second husband's release was an assignment of her chose in action, which was not assignable at law ; and it passed only his own interest, or his right to reduce to possession. Surviving him she would still be entitled, if her second husband have not received. Had he received a valuable consideration for the release, it would have been different. Reversed, &c.

Stewart vs. Loder. Huntingdon. ROGERS, J. As the judgment creditors of a vendor of land, who retains the legal title as security for the unpaid purchase money, are entitled to it upon a Sheriff's sale of the premises as the property of the vendor, it follows that their liens cannot be affected by an attachment subsequently issued for the money due by the vendee on a judgment subsequently obtained. Affirmed.

Commonwealth vs. Duffield. Cumberland. GIBSON, C. J. Where in a will proved in the city of Baltimore, \$10,000 was left to the testatrix here, in the following terms : "I authorize and empower my said sister to give, bequeath and dispose of \$10,000, (to take effect at her decease,) either by her last will and testament, or by any declaration of hers in writing" and the testatrix did "give and bequeath the same to my niece Sarah Duffield, and do direct the executors of my late brother to pay the same to her:" It was held, that the State under the act of 1836, which is in the following terms, "all estates passing from any person who may be seized or possessed thereof, being within this Commonwealth," shall be subject to a collateral inheritance tax, &c., has no claim or legal right in any character whatever to claim a tax from the appointee. It could not be taxed as the property of the appointor in her life time, nor after her death ; nor was she under any moral obligation so to execute the power as to create a tax for the State. The power of taxation is *strictissimi juris* ; and cannot call upon equity to arrest a fund in its transit, till it can fasten its hand upon it.

Though the action is against the executrix, the property belongs to her only in the character of an appointee, and her interest is not by the terms of the act liable to the tax.

Nor can the State demand the tax from the executors of the donor in Maryland. Personal property has no locality as to the succession ; but the rights of creditors and claimants, owing no allegiance to the country of the domicile, are determined by the *lex loci rei sitae*. Here the actual as well as domiciliary locality of the property was Maryland, not "within this Commonwealth;" and the corpus of the fund never was in the hands of the appointor. Affirmed.

N. B.—Mr. J. Rogers assented only on the authority of *Hess vs. Hess*.

Martin vs. Haldeman, et al. Lancaster. GIBSON, C. J. Particular damage when it is a separate and independent part of the cause of action, must be specially laid; but where it is the natural consequence of an injury actionable without it need not be set out. Here the loss of intercourse with friends is a natural consequence of the defamation, and need not have been alleged in the declaration.

It is the practice, English and American, when evidence has not been given on the bad counts to enter the verdict on those which are good, and are supported by proof. It is a matter of legal discretion of which, when the whole evidence is not embodied in the bill of exceptions, the Court of Error cannot judge.

A conspiracy to do an illegal thing is actionable if injury proceeds from it; and where the illegal purpose has been executed, it is false and malicious whenever the motive for the conspiracy to execute it was false and malicious. *Ex vi termini*, a conspiracy to accuse is evidence of its illegality; and as the presumption of innocence holds till it is rebutted, it is also evidence of falsity till the contrary be shown. Falsity of the charge in the first instance implies malice; and where the uttering of the words on which it is made, is not the gist of the action, they need not be set out. The act to be done may be stated in general terms, provided it be stated with convenient certainty. Affirmed.

Irvine, executor of Johnson vs. Woodburn, administrator of Woodbury. Cumberland. Per Cur. When the words of a will were "I bequeath to my daughter, Jane H. Woodburn, intermarried with J. C. Woodbury \$2,000," with other legacies, then, "as to all these legacies to my children they are to be paid when sufficient assets of my estate come to hand for that purpose; but there shall be no interest paid on them until from and after April 1, 1847," with power to the executor to sell and convey all the estate, real and personal; and it appeared that the debts required a sale of all the property: It was held that the legacy was payable within a year, and that it went to her personal representatives. Affirmed.

Lytle vs. Patterson. Blair. COULTER, J. Where the goods of a third person in the hands of one of the partners were sold to pay a partnership debt, and were bought by the other partner, who, after discovering such was the case paid the third person, in an action of account render between the partners, the one so buying and paying will be entitled to the credit, instead of him as whose goods they were sold.

And he is not estopped from claiming the credit, although he did direct the Sheriff to sell them as the goods of his partner, (Lytle,) and purchased them as such, and the Sheriff so returned his writ.

Cooper, late Sheriff, &c., vs. Bonall. Perry. ROGERS, J. A person who accepts a deed from a Sheriff which describes the land sold by him as

lying in Toboyne township, when in fact it lies in Jackson, the other descriptions in the deed being very correct, cannot off set, or defalcate the damages arising to him from this mis-description, in an action brought by the Sheriff to recover from him the difference in the price bid for the land when sold, and the sum bid at a former sale—even though the misdescription runs through the levy, inquisition, venditioni exponas and deed. His remedy is to refuse accepting the deed and have the sale set aside.

An irregular judgment merely (one not absolutely void,) entered according to the loose practice of some counties, will support a levy and sale. In this case the suit was sci. fa. sur. mortgage, with notice to terre tenants. An appearance was entered for terre tenants, and afterwards judgment confessed by the Attorney as Attorney for ———. Plaintiff's Attorney endorses "enter this judgment and issue lev. fa." Prothonotary enters "9 January, 1847, judgment." Held to be as well against mortgagor and terre tenants, sufficient to support the title of a Sheriff's vendee. Reversed, &c.

Magill et al. vs. Swearinger. Juniata. BURNSIDE, J. Where the words in the writ, in an action of ejectment, and on the record, used by the plaintiff, were the "*heirs of Robert Magill, deceased,*" the Court ought to have held them, where the plaintiff claimed other interests than those descended from Robert Magill, which had in fact been sold in his life time, as descriptive of the *persons* claiming, and not the interest claimed. Reversed, &c.

Patterson vs. Herling. Juniata. BELL, J. In an action on a bond given to secure a portion of the purchase money of a house and lot, it is competent for the defendant to make defence, and to defeat the bond in part at least by showing that the plaintiff did not deliver possession of the premises at the time agreed upon, but continued to hold for some time, and that they deteriorated and decayed; and the statute of limitation will not cut out this defence. It is in the nature of a failure of consideration rather than a set off, and is thus a legitimate reply, which denies the cause of action so as not to be within the statute. Reversed, &c.

Lloyd vs. Barr. Blair. BELL, J. In the case of a suit by the third endorser of a promissory note against the first endorser, the latter is *estopped* from setting up a want of notice or other defence, which he might have used when the holder of the note sued all the endorsers jointly; although the issue in that suit was entirely different from this, and went no further than an award of arbitrators. Affirmed.

Moore vs. Bray & Barcroft. Cumberland. BELL, J. Professional communications between lawyer and client are privileged not merely when they are of importance in suits pending or which may arise, but in all cases where the *client* so regards them at the time, though in fact the

professional man may deem them unimportant, and as light and unheeded talk of the client. This is for the protection of ignorant men, and to prevent any obstacle in their minds from hindering free communication with their counsel. In fine, the rule is, *all* professional communications are sacred.

Forster vs. Harris. Dauphin. COULTER, J. Land sold by articles of agreement under seal, the legal title being held as security for the purchase money, ceases to be real estate in the hands of the seller, but may be transmitted by the vendee by contract or deed.

When a purchaser from an heir becomes bound to pay a certain sum stated, as a portion of the debts due by the estate, and he afterwards as administrator, *de bonis non*, allowed interest to accumulate against the estate, on debts, the payment of which he might have accelerated, he will be held liable for the interest accruing on the sum so stated against him. Affirmed.

Com'th vs. The Delaware & Hudson Canal Co. GIBSON, C. J. An act of the Legislature laying a tax on "the capital stock paid in of all banks, companies and institutions, incorporated by, or in pursuance of any law of this Commonwealth," does not include the Delaware & Hudson Canal Company, whose corporate franchises were enacted by the Legislature of New York, though an act of the Legislature in 1823 gave Maurice Wurtz an exclusive right to improve the navigation of the Lackawana, with privileges ordinarily given to a canal company, which rights and privileges were subsequently transferred to the company.

Wurtz was not a corporation, nor could the transfer of his license impress on it the character of a corporate franchise. Affirmed.

Com'th ex. rel. vs. The City of Reading. GIBSON, C. J. A mandamus though a prerogative writ and demandable of right in a proper case, is grantable only at discretion. It is to be invoked only in cases of the last necessity, and when there is no other effectual remedy. Here the nuisance (obstructing a side walk) is a public one, and the relators do not appear to have received any special injury from it, to entitle them to any civil remedy whatever. As it is no more injurious to them than to the public at large, an indictment is exclusively the remedy to abate it. Reversed.

Boone et al. vs. Keim. Berks. COULTER, J. The assignees in bankruptcy of a purchaser of land from a distributee, in which a dower remained which was to be distributed, are naked trustees; and as such competent witnesses, though suit was brought in their names for the use of the heirs.

A special assumpsit against the person who afterwards bought the land need not be brought. The statute and the facts imply an assumpsit. Affirmed.

McCreary vs. Topper. Adams. COULTER, J. An uncertain share in the distribution of the personal estate of a decedent, is not subject to attachment in execution, immediately after the death of the benefactor, and before the settlement of the administration account. The creditor must wait until the actual amount going to the distributee is ascertained. Affirmed.

N. B.—Mr. Justice Bell dissented in this case.

Bitner vs. Brough. Franklin. ROEAS, J. The refusal or inability of a vender to execute a deed, clear of all incumbrances, including his wife's dower, makes him liable in damages. So, if the contingent right of dower was known to the vendee, when he articed, and he covenanted to pay her for signing the deed. This does not make him take the risk on himself. Nor does it excuse the vendor that he offered to comply with his covenant, and make title as far as he was able.

The question as to the amount of damages is settled by the fact whether the refusal is in good or bad faith; a refusal for cause; or collusion with the husband. In the former (the husband being willing to perform his part) nominal damages only will be recovered. In the latter compensatory, for the loss of the bargain.

In this case damages were really sustained by plaintiff by his removal to take possession. Besides the property rose in value; and he offered to take a deed with the husband's covenant against dower. There was some evidence of collusion; the charge of the Court was proper; and the damages allowed by the jury, (compensatory,) are sustained by the rules of law. Affirmed.

Oliver & Wife vs. The administrators of Moltz. Cumberland. BELL, J. The facts in this case which has been long litigated are as follows: In 1835 the ward who had shortly before attained majority settled with her guardian, and on receiving \$730 gave him a receipt in full. The guardian died in 1838, leaving the receipt among his papers. In 1843 his administrators settled a final account, and made distribution among the heirs of the deceased, without requiring refunding bonds as required by act of 1834. The ward married in 1842, but they made no claim until 1844, after the distribution. In 1845 a guardianship account was settled against the representatives, and the auditors reported notwithstanding the receipt in full, \$1972 due the ward, which was confirmed by the court. Held, that the administrators will be liable to answer, as the decree was unappealed from; also, the statute of limitation will not run; as the decree was final and conclusive. These defences are no more available to the representatives than they would be to the guardian were he alive.—Nor were there any *laches* on the part of the ward to estop her. If refunding bonds were not taken it was the administrator's own fault.

But there can be no recovery in this action (on the administration bond.) The administrators must be charged with a *devastavit*. Non-payment of a debt is not such a breach of the condition of the bond, as to enable creditors to sue upon it. Upon this point alone is the judgment affirmed.

Hasstinger's Estate. Lebanon. Per Cur. The prima facie rights to priority of administration may be controlled by evidence of incompetence, or unfitness from circumstances. When the interest in the administration claimed, would be antagonist to one already held, as entitling to a settlement with himself; and when all entitled by priority are in contest for the administration, it ought to be committed to an impartial stranger, rather than to them. Affirmed.

Clarke vs. Ulman & Stanley. BELL, J. Where real estate was sold and a mortgage and bonds taken to secure the payment of the balance of the purchase money, and afterwards a second mortgage was given by the purchaser on the same property. The money secured by the first mortgage not being paid as stipulated, a suit was brought and judgment obtained upon one of the bonds after the entry of the second mortgage; a fieri facias issued and the real estate sold; Held that the lien of the second mortgage was discharged, notwithstanding the letter of the act of Assembly of 1830. Affirmed.

Shay vs. Sessamen. Lebanon. GIBSON, C. J. Under the bankrupt law, "property and rights of property" alone are transferred to the assignee. But a legacy to the wife is neither within the meaning of our act, though it would be otherwise in England. Affirmed.

Krause & Boas vs. Donahue. Dauphin. ROGERS, J. Attorneys are not liable for money collected by them, or their agents in whose hands the claim was placed, until demand is made, unless in case of fraud, malpractice, negligence, or endeavors to baffle the client. Reversed.

Fitch's Appeal. Dauphin. BELL, J. A Sheriff who makes a sale and receives more than his execution calls for, cannot retain the surplus and apply it to a private debt due him by the execution debtor. Especially is this the case where the money was paid into court. In such case the debtor, or his transferee must take it out in preference to the Sheriff. Reversed.

Wattman vs. Allison. Dauphin. COULTER, J. In replevin, where the defendant avowed for rent in arrear, the terms of the lease, as to the sum due, and how and when payable, must be proved as laid in the declaration; and all must accord. Reversed, &c.

Bogus' Appeal. Lebanon. COULTER, J. Where by the terms of a will the executors were granted power to appoint appraisers to ascertain the value of the land after the death of the widow, and fix the time and manner of payment by the devisee, which was done, the Orphans' Court

has not power to grant a rule upon the devisee, to show cause why the appraisement should not be set aside. The testator fixed the forum; and the Orphans' Court will interfere only in case of collusion, fraud, or gross mistake in the exercise of the power by the executors, to set the appraisement aside. Affirmed.

Taylor vs. Gill. Dauphin. BELL, J. There is no error in admitting a witness to testify before his interest becomes apparent.

When the interest becomes apparent after the testimony is given, instructions to the jury to discard should be asked.

In regard to interest, the late cases have had in view to get back to the common law rule, which is that all who have no interest in the subject matter of the suit when called to testify, are competent, except they be parties to the action, or substantially occupy that position.

When a bill single is assigned for value, the person who assigned it, cannot afterwards be permitted to defeat it on the ground of a fraud by the first assignee to him. Reversed, &c.

Schuylkill Navigation Co. vs. Commissioners of Berks county. Berks. ROZAS, J. A house occupied by the office and family of the toll collector of a canal company, is not taxable for State and county purposes, though distant from the banks of the canal, is three stories high with some ground appurtenant, and is valued at what some might be considered an extravagant sum. The managers are the judges of what is proper in these respects for the accommodation of the public and the company.—The corporate franchises of the company and stockholders are taxed in other forms than by assessment. Reversed.

Commonwealth vs. Hutchinson. Dauphin. ROZAS, J. Debts due the Commonwealth are not discharged by a certificate of bankruptcy under the act of 1842. There is nothing in the act requiring the Commonwealth to prove her debt before the commissioner. The Commonwealth is not named in the act, and unless she is, cannot be compelled to go before such a special tribunal. Reversed.

N. B.—Coulter, J., dissented. He held that the State has yielded her sovereignty so far as the passage of a bankrupt law is concerned, and is bound by its terms the same as individuals.

Zinn and Snyder's Appeal. Dauphin. COULTER, J. Where an administrator received rents, issues and profits of real estate, and introduced them into his account as administrator, so that a balance was decreed against him, and he afterwards became insolvent, and his sureties petitioned for a review of the account within five years after final decree, it is the duty of the Orphans' Court to allow a review under the act of 1840. In such case sureties are not held by the condition of their bond, and as the money is not *actually paid* as required by the act, they are entitled to relief. Reversed.

Grove vs. Detweiler. Lancaster. BURNSIDE, J. The tenant of a mill upon shares is a competent witness for the defendant, in a suit for raising the dam, and flooding back the water.

A practical and professional mill-wright who has levelled the water, and who would have stated that in his *opinion* if the dam was a foot lower it would be impossible for the mill to grind, as it has been proved to have done for 60 years, is an *expert* so as to entitle his opinion to go to the jury. Reversed, &c.

Johnston vs. Curran. Juniata. COULTER, J. The intent of a testator as manifest from the entire will, will control the meaning of technical words. In this case the words were "in case any of my daughters die without heirs of their bodies, it is my will that their part as above bequeathed be equally divided between the survivors of them and my grand children," &c.

Held, that by the words used, the testator could not have intended a failure of issue at an indefinite period of time, but only at their death.—Affirmed.

Emaus' Orphan House Appeal. Dauphin. ROGERS, J. In case of a series of accounts filed and confirmed by the Common Pleas, the Supreme Court is limited in its enquiries to the last account, which was appealed from, and to which exceptions were filed. The other accounts are open to examination only on appeal in each, which must be taken within the time allowed by law.

A trustee is liable only for the actual property of the estate, and cannot be charged with more, except on proof of supine negligence, or wilful default. The mere fact that the estate does not yield annually as much as the neighbors conversant with its management think it might be made to yield, is not sufficient to surcharge the trustee. In this case no particular bad management is proved. Affirmed.

Presbyterian Church of Harrisburg vs. Allison. COULTER, J. In case of materials furnished on the credit and responsibility of the contractor, the church is not liable to a lien. But the fact that they were charged to the contractor alone, is not exclusive evidence, but may be explained and left to the jury.

The book in which the charges are made may be given in evidence, though it contradicts the claim as filed; and the whole matter may be explained.

Brick furnished and delivered for the construction of the building and on its credit, although used for any purpose in aid of the edifice, such as building walls to protect the cellar windows and laying a pavement within the enclosure are proper materials for a lien: and if never used for any purpose, are nevertheless if so furnished, protected by the lien law.

A church is a *building* within the meaning of the act of 1836, and is subject as such to mechanic's lien. Affirmed.

SUNBURY, JULY, 1849.

[Reported for the American Law Journal, by ALEXANDER JORDAN, Esq.]

Weidner vs. Matthews. Error to C. P. of Northumberland county.—
BELL, J. A judgment by consent, saving the rights of defendant, will enable him to maintain a writ of Error.

Exceptions to a defective recognizance on appeal from report of arbitrators must be made in a reasonable time, and before other steps to prepare the cause for trial, or the defect will be considered as waived. It is too late after the trial and judgment to move to quash an appeal.

Morrison vs. Buck. Error to Lycoming county. **BELL, J.** Trustees and officers of the law, are forbidden by law from purchasing at their own sales, directly or indirectly, though it does not *ipso facto* avoid such a purchase. It is voidable, at the election of the cestui que trust, though its ratification by heirs or devisees will not protect it against the creditors of a decedent.

Byers vs. Heck. Error to C. P. of Union county. **BURNSIDE J.** Whenever property is sold by the Sheriff on a judgment entered on the same day with a mortgage, and there were judgment liens prior to the mortgage, the property is not sold subject to the mortgage.

Maus vs. Hummel. Error to C. P. of Union county. **COULTER, J.** It has been fully settled by this court, that duly prosecuting a suit, when suit has been brought within the 7 years, only extended the lien of the debt to 12 years; and that obtaining judgment against administrators created no lien distinct from that of the lien of the debt. That lien being gone, in this case before the levy and sale, no title was transferred upon those who purchased.

Hays, Elliott, &c. vs. Gudykunst. Error to C. P. of Lycoming co. **W.** was a debtor of plaintiff's. He purchased goods from them and gave a promissory note signed Wetzol & Gudykunst. Suit was brought in Lycoming county, on this note, and an award made in favor of plaintiffs from which G. appealed, and a verdict rendered in his favor on the ground that at the time W. signed the note, W. & G. were not partners.

On the trial of the case in Union county, W. was offered as a witness by plaintiff, without being released, to prove a promise by G. to pay this debt in consideration of forbearance and an assignment of property to a large amount by W. to G.

Held, that W. was a competent witness, and that the record of the suit in Lycoming county, was not a bar, as it was brought on the note, and not on the promise of G. **ROGERS J.**

Taylor vs. Blake. Error to C. P. of Lycoming county. **BURNSIDE, J.** The courses on the ground are to be respected without regard to the variation or distance marked on the draft.

It is error in the Court to refuse a witness, who ran a disputed line, to be asked "whether a survey made in the manner he made these surveys, was such a resurvey of the two surveys in question, as would in his opinion as a surveyor and artist, determine the question, as to the existence of these surveys on the ground."

Robb, administrator of Shoemaker's vs. Mann. ROGERS, J. When a contract is made for the sale of land, equity considers the vendee as the purchaser of the whole estate sold, and as a trustee for the vendor for the purchase money. So much is he actually considered as seized of the estate, that he must bear any loss which may happen to the estate, between the time of purchase and conveyance. The same principle is applicable to a sale made by an administrator by order of the Orphans' Court.

Time is not of the essence of a contract;—if, therefore, an Orphans' Court sale is not confirmed at the time stated in the conditions, owing to exceptions taken to it, and filed, the purchaser is not at liberty to rescind.

Yortheimer vs. Kryser. Error to C. P. of Northumberland county. A creditor of a bankrupt after his discharge under the bankrupt law, inquired of him "will you pay this [my] debt?" The bankrupt replied, "I am going to do it as soon as I get able, and I am going to pay all my honest debts, except some in the city." Held that this, though the expressions of an intention, did not constitute an engagement, which is necessary to give legal effect, to a moral obligation. Per Cur. opinion.

Heitzman vs. Divil. Error to C. P. of Union county. BURNSIDE, J. A bailer is not a competent witness for the bailee, in an action brought by the latter against a third person, for levying on the property bailed, where the object of the bailment is to postpone a claim of a landlord.

Lover & Banen vs. Mann and others. Error to Lycoming county. ROGERS, J. Suffering property to remain in hands of a defendant after a judicial sale, is not a badge of fraud. Actual fraud may be perpetrated under cover of a judicial sale.

Caldwell vs. Brindle. Error to Lycoming county. Per Cur. A recognizance entered into before a Justice of the Peace for stay of execution, in which no sum is mentioned, or condition set out, is void.

Certiorari to Quarter Sessions of Union county. ROGERS, J. A report of viewers dividing a township, should contain an explicit opinion of the Commissioners as to its expediency and propriety, without which the report will be set aside.

Zerns terre tenant vs. Watson for Stitzer. Error to C. P. of Union county. BELL, J. W. obtained judgment by confession against Roush and Stitzer, on 14th January, 1843, conditioned to save and keep harmless the said W. against incumbrances. S. was R.'s security. The condition having been broken, W. sued out a sci. fa., alleging breaches, without notice to the terre tenant who purchased a tract of land from Roush by article of agreement of 9th September, 1842, and by deed of conveyance of 20th January, 1843. On 2nd February, 1844, R. & Stitzer confessed judgment on the sci. fa. for \$1226 90. This was paid out of proceeds of sale of Stitzer's property and satisfaction entered by the plaintiff. The judgment was afterwards marked by plaintiff's attorney for use of Stitzer, who sued out the present sci. fa., which was served on Zerns alone.

Held, that the judgment confessed by R. & S., without the participation of Z. the terre tenant, was no lien or incumbrance on the land in his hands, the same having been aliened before the sci. fa. issued.

Cameron vs. Paul. Error to C. P. of Union county. BELL, J.—Since the act of 1842 and 1845, the plaintiff is entitled to his costs which

accrued since the appeal from the award of arbitrators, notwithstanding he recovered by verdict a less sum than was awarded him by the arbitrators. But he is not entitled to recover the costs which accrued in Supreme Court on a writ of Error sued out by him.

Deatler vs. Brown. Error to Lycoming county. **BELL, J.** The doctrine in *McGinnis vs. Noble*, 7 W. & S. 454, recognized and affirmed, and a vendee who suffers the land to be sold by Sheriff, under incumbrances entered against the vendor before the conveyance, and becomes the purchaser, can only deduct from the bond given for the purchase money the sum paid at Sheriff's sale, although the purchase money was not due at the time of the Sheriff's sale.

In the matter of the Appeal of Dr. Cummings from the decree of Orphans' Court of Union county. **ROBERTS, J.** Testamentary guardianship is not determined by the marriage of a male ward—the guardianship of females is.

By the act of 11th April, 1848, a married woman must hereafter be considered as feme sole in regard to any estate of whatever name or kind owned by her before marriage, or which shall accrue to her during coverture, by will, descent, deed of conveyance, or otherwise. A testamentary guardian of a female cannot be compelled to relinquish his trust, until she acquire, by time, a legal capacity to act for herself.

Geerkart vs. Jordan, et al. Error to C. P. of Columbia county. **BELL, J.** Subrogation is admissible wherever a joint creditor of two funds belonging to different debtors, appropriates one of them in payment of his debt, in disappointment of another creditor of that fund, provided the untouched fund is that from which, in fairness and honesty, payment of the joint debt ought first to have been drawn.

Brady for Snyder vs. Baldy and others. Error to Northumberland county. **COULTER, J.** Thomas Grant in his will made in 1815, directed his executors after the death of his widow, to whom he devised the manor farm during life, to sell it and divide the proceeds equally among his children.

Held, that the share of George, one of the children, was liable to attachment in the hands of Baldy, the purchaser, under a sale made by the administrator, &c., with the will annexed, he having filed an account prior to the sale, shewing a balance in favor of the estate.

Certiorari to Northumberland and Columbia counties. **BURNSIDE, J.**—Where a creek is the line between two adjoining counties, a public road laid out by the concurrent acts of both counties, commencing at a point 40 rods off the line, and crossing the line twice at angles, part of the road being in one county, and part in the other, in some places 35 perches from the line, cannot be supported under the 26th sec. of the general road law passed in 1836.

Overseers of Beaver vs. Overseers of Hartley. Certiorari to Quarter Sessions of Union county. **BURNSIDE, J.** It is not necessary that the lease mentioned in the act of Assembly should be in writing. Going into possession and paying rent for the premises, that are of the yearly value of \$10, and dwelling upon the same for one whole year, gives a settlement. The rent need not be paid in money, but may be paid in labor or otherwise. Such houses as are usually erected about furnaces for the laborers, are tenements within the meaning of the act.

MR. ROBERT WALSH, in a recent letter from Paris, says:—The Paris Court of Appeals has decided that the condition *not to marry*, attached to a legacy, is contrary to the freedom of marriage, and must, therefore, be held as if not written.

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SEPTEMBER, 1849.  
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United States District Court.--In Admiralty.

THE MALAGA.

<i>Charles J. Lovett, Josiah Lovett, Jr., Elliott Woodbury and Seward Lee, owners.</i>	} Marine tort
vs.	
<i>John E. Bispham, Lieut. Commanding the U. S. brig Boxer.</i>	

1. The ordinary practice of the Admiralty Court is to entertain the question of damages as well as costs at the same time with the principal question of the legality of the arrest; revenue laws form an exception, however.

2. A certificate of probable cause cannot be granted where there has been neither claim nor trial, nor decree, nor any thing to which an appeal could lie, because there is nothing to inform the conscience of the Judge as to the propriety of giving or withholding the certificate.

3. Probable cause defined and explained. If there is reasonable ground for a seizure, and this is a question of fact, it is a defence to a libel for damages.

4. An act of restitution and acceptance, as was the case here, is a mutual release, and bars the libellants' claim had it been never so meritorious.

Per KANE, J. By the act of Congress 3d March, 1819,
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(8 Statutes at Large, 532,) the President of the United States is authorized, whenever he shall deem it expedient, to cause any of the armed vessels of the U. States to cruise on the Coast of Africa and elsewhere, with orders to seize, take, and bring into port all American ships which have taken on board, or which may be intended for the purpose of taking on board, slaves, in violation of the Acts of Congress prohibiting the slave trade; and by the same Act, it is made the duty of the commanders of public ships so employed, whenever they shall have "made any capture" of an American vessel contravening those acts, to bring her for adjudication into the State to which the "vessel so captured" belongs.

Among the Acts thus referred to are that of 22d March 1794, (1 St. L., 347,) which denounces the penalty of forfeiture against every ship or vessel sailing from any port of the United States for the purpose of carrying on any trade or traffic in slaves, or of procuring slaves to be transported to any foreign country,—that of 10th May, 1800, (9 St. L., 70,) which subjects to forfeiture the interest of every citizen or resident of the United States in any vessel employed or made use of "in the transportation of slaves from one foreign country to another"—that of 21st April, 1818, (3 St. L., 450,) the second section of which is almost identical with the provision I have referred to in the Act of 1794,—and that of 15th May, 1840, (3 St. L., 600,) which denounces as piracy the crime of seizing a free negro in any foreign country, or decoying, bringing, carrying, or receiving him on board a ship, with intent to make him a slave, or to confine or detain him on board with such intent, or to offer or attempt to sell him as such, or to land him with intent to make such a sale, or after such a sale has been made.

These acts were followed by the Treaty of Washington, (August, 1842—8 St. L., 576,) by which it was stipu-

lated between the United States and Great Britain, "that each nation should prepare, equip, and maintain in service on the Coast of Africa, a suitable and adequate squadron or naval force, to carry in all not less than eighty guns, to enforce separately and respectively the laws, rights and obligations of each of the two countries for the suppression of the slave trade."

In accordance with the first cited of these acts of Congress, and in compliance with the treaty stipulation, the President of the United States, on the 20th December, 1844, ordered Commodore Skinner to proceed with a squadron to the Coast of Africa to cruise there for the suppression of this traffic. In the instructions of the Secretary of the Navy to this officer, he was told—"the cunning of the slave trader is constantly framing new disguises to elude detection and escape the consequences of his crimes. To some of these devices it may be useful to call your attention. It is not to be supposed that vessels destined for the slave trade will exhibit any of the usual arrangements for that traffic. They take especial care to put on the appearance of honest traders, and to be always prepared as if in pursuit of lawful commerce. It is their practice to run into some river or inlet, where they have reason to believe that slaves may be obtained, make their bargain with the slave factor, deposit their hand-cuffs and other things calculated to betray them, and then sail on an ostensible trading voyage to some neighboring port. At the appointed time they return, and as the slaves are then ready to be shipped, they are taken on board without delay, and the vessel proceeds on her voyage. Thus the slavers do not carry within themselves any positive proof of their guilt, except before they reach the coast, and after they leave it with slaves on board. Nevertheless, there is a variety of signs and indications by which their true character may at all times be conjectured."

The Secretary then points out some of the marks by which a slaver may be recognized, and some of the artifices by which he generally seeks to mask his character. He adds : " These are a few only of the devices to which the slave trader resorts. In calling your attention to them, I have only in view to impress you with a deep sense of the artful character of the adversaries with whom you will have to deal, and of their reckless disregard of all truth and honor, as well as of all law and humanity. Nothing but the utmost vigilance and caution will enable you to detect them. I have no doubt that your own observation and sagacity will soon discover other contrivances for deceiving and escaping you, and I have as little doubt that you will apply, promptly and effectually, the requisite means of defeating all such attempts."

Lieut. Bispham commanded the brig Boxer, one of the squadron under Commodore Skinner, and was directed to cruise in the vicinity of Kabenda, " where," said his orders, " our flag, it is believed, is frequently employed to cover the designs of slavers." Immediately on his arrival off that port, and before anchoring, Lieut. Bispham was informed by the commander of a British frigate, that an American brig was lying in Kabenda Bay, under suspicious circumstances ; and on the following day, the 13th April, 1846, he directed her to be boarded in consequence. On producing her papers at the call of the boarding officer, she proved to be the American brig Malaga, of Beverly, Massachusetts, with a cargo of farina, rice, rum, gunpowder, &c., from Rio de Janeiro, bound to Kabenda and St. Thomas, and back to Rio. Her consignee at Kabenda was a noted slave factor, named Da Cunha ; the port was one devoted exclusively to the slave trade and its tributaries ; and the cargo was entirely suited to the exigencies of that traffic. A part of her cargo, and a number of passengers, (foreigners,) had been already landed.

Lient. Bispham, having seized her, called for her charter party ; and this, being then presented for the first time, showed that she was under charter to Manuel Pinto de Fouseca, whose name, as the great employer of American vessels in the Brazilian slave trade, is familiar to our political and judicial records. The charter party itself was similar in all respects to that which is ordinarily used to cover these frauds upon our flag ; it left the port or ports of destination to be indicated by the charterer's agents ; it stipulated for the conveyance of passengers, not negroes ; and the rate of charter, (1800 milreas, about 1400 dollars a month, paid for the first month in advance, the vessel being of less than 184 tons,) implied that the voyage was one of peculiar hazards. The vessel, moreover, when leaving the United States for Rio, had laid in a stock of provisions for a year ; her crew had been shipped for 18 months, the voyages beyond Rio to be such as the captain might direct ; among which the deposition of one of the crew shows that a voyage to the Coast of Africa, though not named, was understood to be included.

In addition to all this, the answer, which is not contradicted under oath, (as it should have been, unless the facts set forth in it are to be regarded as admitted,) avers, that in conversations of the captain with the captors, "it was not alleged by him, that it was his intention to barter her coast goods on shore, or to carry back a return cargo to Rio de Janeiro ; but he admitted that the cargo on board was to be exchanged for slaves, and used in that traffic." And this is confirmed by the testimony of Purser Hartwell : "I remarked to captain Lovett, you must know the character of the cargo was such as is generally used on the coast in the slave trade ; and his reply in substance was, he was not bound to know any thing about it, and if that was the only business carried on at Kabenda, it was not necessary for him to be acquainted with it, nor for what purposes his cargo was to be applied."

The *Malaga*, having arrived in the United States in charge of a prize crew, was libelled by the District Attorney of the United States for the District of Massachusetts, on the 16th June, 1846. The libel was of two counts, the first charging that, being the property of American citizens, she was employed in transporting slaves from one foreign country to another; the second—that she was fitted out, &c., and caused to sail from the United States for the purpose of procuring negroes to be transported from Africa to some port or place, for the purpose of there being sold as slaves; the first count being founded apparently on the act of Congress of 1800, and the second, on those of 1794 and 1818. The process was returned on the 2d July, an appearance was noted upon the docket by a proctor of the Court, a stipulation was entered into for costs preliminary to a claim by the owners, and depositions were taken before a Commissioner, the proctor for the owners or claimants attending him. Subsequently, on motion of the District Attorney, it was ordered by the Court, that “said libel be discontinued, and said brig *Malaga* be delivered to Charles J. Lovett, captain thereof:” and a warrant of delivery, having issued, was returned by the Marshal on the 17th July, that he had “caused the vessel to be delivered to C. J. Lovett, and had taken his receipt therefor;” which is verified by the receipt itself; “July 17th, 1846, received from U. S. Marshal, in and for the District of Mass., the within named brig *Malaga* and appurtenances, in the same state as when seized and detained by him. Charles J. Lovett, master brig *Malaga*.” No formal claim was ever made of record, and no answer was filed.

In June, 1847, Lieut. Bispham returned from the coast *invalided*; and on the 17th July succeeding, this proceeding was instituted against him by a monition issued at the instance of the owners and captain of the *Malaga*.

The libel asks damages for the unlawful detention of the vessel, the use of her stores while under detention, certain injuries done to her sails, rigging, and other appurtenances, and the personal duress of the captain. The answer refers to the instructions of Lieut. Bispham from his commanding officer, admits the seizure and detention of the vessel and the use of the stores by the prize crew, but denies that the vessel or her appurtenances sustained damage, and alleges that the seizure was made in consequence of a reasonable suspicion that the vessel had violated the laws against the slave trade, the grounds of which suspicion it sets forth.

The proofs in the case are few and by no means full.—From the Libellant in this Court I have the register, the charter party, the record of the proceedings in the District Court of Massachusetts, the deposition of the mate, taken in February last, under a rule of Court, and two brief depositions, or as I would rather term them, affidavits, from seamen, made under the act of Congress, without cross-examination or notice. There are wanting the bills of lading, the passenger list, the crew roll, the Consular certificate, and, generally, the papers with which the vessel sailed from Rio for the Coast. The Respondent has presented only the depositions of three officers of the Boxer, taken before a Commissioner more than two years after the transaction.

According to the view of the Libellants, however, much even of the proof that is before me might have been spared. They contend that the inquiry cannot now be entertained, whether there was reasonable ground for the arrest, or not; inasmuch as the District Court of Massachusetts has ordered restitution, without granting a certificate of probable cause. If this be so, the function of this Court expends itself in the simple duty of auditing the amount of the Libellants' damages:—the question, therefore, must be disposed of at the threshold.

In the first place then, I remark, that except in cases under the Revenue and Navigation Acts, I have not found either in the English books, or our own, that the certificate of probable cause has ever been given or asked for in the Admiralty. By the ordinary practice in instance, as well as prize causes, the Court entertains the question of damages, as well as costs, at the same time with the principal question of the legality of the arrest. The process issues *ex rem*; the claimant comes in, asserts his right, and asks damages, if he deems himself entitled to them; and the Court then, upon a full view of the ground, the cause and the circumstances of the seizure, determines between the parties; each being for the time the *actor*.

Cases under the Revenue laws form the exception in both countries,—in England, by force of several statutes: 4 Geo. 3 c. 15. § 46; among the rest;—and in the United States, by the provisions of the Acts of Congress of 2 March, 1799, § 89, and 24th February, 1807. Nothing therefore is to be inferred against the Respondent from the absence of such a certificate in the proceedings before the District Court of Boston.

But were this otherwise, I cannot, upon inspecting the record of that proceeding, perceive that the question of a certificate was, or could have been, brought before that honorable Court. There was in fact no hearing of the cause, and there could have been nothing, therefore, to inform the conscience of the Judge as to the propriety of giving or withholding the certificate. According to the acts of Congress both of 1799 (1 St. L. 696,) and 1807 (2 St. L., 422,) there must have been a claim, a trial, and a decree for the claimants, to authorize the making of the certificate. The question whether it shall be given or not arises out of the decree of acquittal; and it is decided by the Judge who tried the cause, on the evidence which was before him at the trial.—Further evidence is not admit-

ted. (Stewart's Reports, 112.) An appeal from the decree carries with it the application for the certificate.— (Canter vs. the Am. Ins. Co., 3 Peters, 307, and the other cases.) And if on the appeal, the question of forfeiture is decided against the claimant, there is an end to all controversy about probable cause. The officer cannot be held liable for a seizure as tortious, after its propriety has been established by a final decree, condemning the property.— But here, there was neither claim, nor trial, nor decree, nothing to which an appeal could lie. It was a simple discontinuance, which, considered as an act in the cause, terminated it, but did not preclude the institution of new proceedings by the same captors and for the same cause. How can it be said that the captor is estopped by his discontinuance from alleging that he had probable cause for the seizure, when that discontinuance left him at full liberty to re-assert his title under the forfeiture, and to renew the seizure, if need be, for the purpose of enforcing it?

But it was argued, that independent of these acts of Congress, the officer who has made a tortious seizure, has no escape from a decree of compensatory damages. But I need scarcely say that this has never been the law of the Admiralty, either in instance or prize cases. The books are full of cases, in which the arrest on the high seas has been held unlawful, but the Court has refused to allow the claimant his damages or even his costs. I may refer to the *Louis*, 2 (Dods. 210,) to *Shattuck vs. Maley*, (1 Wash. C. C. R., 247.) The *Mariana Flora* (11 Wheaton, 1,) as among the marked cases in which this course of adjudication has been pursued.

“The common law doctrine,” said Judge Washington in *Shattuck vs. Maley*, (1 W. C. C. R., 247,) “as to torts committed by officers acting under authority of law, is certainly very rigid. They act at their peril; and if they by mistake act wrong, there are but few cases in which

they can be excused. But a reason may exist for this severity in cases happening on land, which does not exist where similar cases occur at sea. In the former, the means of obtaining correct information are more within the power of the officer; and the officer may, in most cases, if he doubts as to the fact, insist upon being indemnified by the party. But at sea this cannot be done."

"To hold the officer," he adds (p. 249,) "responsible according to the event, would be to render the law nugatory; since few men would be found bold enough to ensure the eventual solidity of their judgment, however strong they might suppose the ground of it to be. But to excuse the officer from damages, if he should in the execution of this limited authority violate the rights of others, he must show such reasons as were sufficient to warrant a prudent, intelligent and cautious man in drawing the same conclusion. This is what is called Probable Cause."

"It is a different thing," said Judge Story, delivering the opinion of the Supreme Court in the *Mariana Flora*, "to sit in judgment on this case, after full legal investigations, aided by the regular evidence of all parties; and to draw conclusions at sea; with very imperfect means of ascertaining facts and principles, which ought to direct the judgment. It would be a harsh judgment to declare that an officer, charged with high and responsible duties on the part of his government, should exercise the discretion entrusted to him at the peril of damages, because a court of law might ultimately decide that he might well have exercised that discretion another way. * * * Even in marine torts independent of prize, Courts of Admiralty," he added, "are in the habit of giving or withholding damages upon enlarged principles of justice and equity, and have not circumscribed themselves within the positive boundaries of municipal law. They have exercised a conscientious discretion on the subject."

I am, therefore, not precluded by the action in the District Court of Massachusetts from entertaining the question, whether there was reasonable ground for the seizure of the *Malaga*; and if there was such reasonable ground it is a defence to the present libel.

In discussing this question, which is altogether one of fact, I feel very sensibly the imperfection of the proofs before me. I should be well pleased to examine the bills of lading, and shipping roll, appertaining to the voyage from Beverly to Rio, and the letters of instructions under which the captain felt himself authorized to charter her to Fouseca. I need, too, the manifest, the log book, the list of passengers from Rio for the coast, the crew list, the bills of lading, and all the other papers which were or should have been on board of her when she was arrested. These, if produced, might go to relieve my mind of the dark suspicions which now press upon it. If they were ever in the possession of the captors, they were restored with the vessel; and the libellants should have produced them here. In their absence, I can only say that I am by no means satisfied of the innocence of this vessel, and that I think her owners may be well content with her release without asking more. Among the circumstances, already adverted to in the narrative part of this opinion, there is one, which standing by itself unexplained, would go far to justify the arrest of the *Malaga*. According to the mate, "she had on board some three or four hundred bags of *farina and rice*." The former of these articles is a coarse flour, used almost exclusively for the diet of slaves on the passage to Brazil. It is the cheapest substitute for the African cassada, which is the food of the natives along the coast, and resembles it much. By the British act for the suppression of the slave trade, (2 and 3 Victoria c. 73 sec. 4,) it is expressly provided, that "An extraordinary quantity of rice, or of the flour of Brazil,

commonly called Farina, beyond what might probably be requisite for the use of the crew, found on board of a vessel, and not entered on the manifest as part of the cargo for trade, shall be considered as *prima facie* evidence of the actual employment of the vessel in the transportation of negroes for the purpose of consigning them to slavery," and as such, shall render her liable to condemnation.

The three or four hundred bags of rice and farina, which were on board of the Malaga, were obviously not for the use of the crew; since the vessel was otherwise provisioned fully. If they were entered upon the manifest, the presumption which they raise would be rebutted; but the manifest, as I have already said, is not produced. It would be a severe judgment against an American officer, charged to give effect to the treaty stipulations between his country and Great Britain, to hold that circumstance inadequate as a ground of reasonable suspicion, which in an English Court would condemn the ship.

But independent of this fact, the whole case is pregnant with suspicion. There is scarcely a circumstance wanting except the final consummation of a guilty purpose, to place it at the side of the Pons, whose fate is upon the records of this Court, and her associates, the Enterprize and the Kentucky, as they stand out in the documents of Mr. Wise, that accompanied the President's Message of the 8d March last,—the same charter party scarcely varied, and the same Messrs. de Fonseca and Da Cunha figuring as principal and subordinate.

Whether she was intended to be used in the actual transport of slaves; or to serve as the tender and accomplice of the slave ship, carrying out the foreign crews which were to navigate to Rio under the Brazilian flag, and bringing back the American, which had navigated from Rio under that of the United States:—whether she merely carried to the coast, the goods which were to pur-

chase slaves, and the farina which was to feed them ; or whether, after landing part of her supplies at Kabenda, she was, in the words of the Secretary of the Navy, to "sail on an ostensible trading voyage to some neighbor-port, returning when the slaves were ready to be shipped—and then taking them on board without delay," I need not form an opinion. Nor need I inquire in the absence of all the appropriate proofs, whether the sailing from Beverly for Rio was altogether free from dishonoring circumstances. It is enough for me to be convinced,—and of that I am convinced most fully,—that Lieut. Bispham acted with intelligent and honorable discretion in arresting the Malaga, and sending her to this country for adjudication.

It is wholly immaterial for his defence, whether all, or how many of these circumstances of suspicion, were present to his mind at the time of the arrest. If the vessel was guilty, he is excused for bringing her in, even if he mistook her crime. I adopt the language of Judge Story on this point, (*La Jeune Eugenie*, 2 Mas. 455 :) "In truth the law looks not to niceties of this sort. If for any cause precedent or subsequent, known at the beginning or known at the end, the property is condemned, the party is justified ; and retroactively, for all purposes, the capture, or seizure, or forcible possession, call it what you may, is deemed rightful and *bona fide*."

I have thus far followed the learned counsel, in the arguments they have presented to me, and should be excused perhaps for dismissing the cause without further remark. But there is one view of the closing act in the proceedings at Boston, which I cannot pass over. That act, as it seems to me, was an act of restitution and acceptance, unqualified, unconditional—without reserve or protest on either side. The action of the Court was invoked, only because the property had passed into its cus-

today, and could not be released except by judicial order. The act was the act of the parties, solemnized by record. Such an act of restitution and acceptance is a mutual release, and bars the libellant's claim, had it been never so meritorious.

A case, closely analogous to the present, came before Sir William Scott, in the *Maria Rowland*, (6 Rob. 236.)—The vessel had been captured, and was restored before final adjudication. The owners afterwards presented a demand in the Admiralty against the captors, for damages; and they urged that the captain's acceptance of the property was not intended as a waiver of damages—that it had no other object than to expedite justice, and that it had moreover occurred without any consultation with his principals, the owners, and without any opportunity for such consultation. Sir William Scott said: "On the papers being brought in, a proposal was made to the master that he might proceed on his voyage, and it must be understood to have been an absolute and unqualified proposal, and meant as a general acquittal on both sides. If there had been an intention to prosecute a demand for damages, arising from the seizure, the offer should have been accepted *sub modo*; instead of that, the restitution was accepted in the manner in which it was proposed; and as such, must be understood to include an act of amnesty on both sides. It is not for the parties, then, to come again before the Court, after all the papers have been withdrawn, and charge the captors with an unjustifiable seizure, when they have, in consequence of the restitution lost the opportunity of defending themselves. The claimant must take the inconvenience with the convenience of restitution. I am of opinion that the claimant has put himself out of Court, and that the offer of restitution being accepted as it has been, must be considered as a discharge.

I need not advert again to the circumstances in the case before me, which give emphasis to Sir William Scott's argument. The libel must be dismissed with full costs.

Libel dismissed with costs.

Mr. J. Williams Biddle, Mr. Williams, for Libellants.
Mr. Hazlehurst, Mr. Pettit, for Respondents.

District Court of the United States.--In Admiralty.

JOHN HARTMAN vs. THE BRIG WILL.

G. M. Wharton, }
R. R. Smith. } Proctors for Libellants.

Ed. Waln—Proctor for Respondent.

1. It is well settled that the sale of a ship by the master, to be sustained by a Court of Admiralty, must be enjoined by a policy so clear as to be equivalent to a moral necessity.
2. One who accepts title under a captain's sale must see that his title is without taint or just cause of suspicion.
3. The captain is an agent from necessity and his conduct will be closely scanned.
4. On the question of the integrity of the sale, the captain's evidence is vital to the claimant's case.

Per KANE, J. The brig Will, belonging to the Libellant, and employed for the time as a transport in the service of the U. S., was driven upon the beach near Sacrificios, in the Gulf of Mexico, by the "Norther" of the 20th of March, 1847. The part of the shore on which she lay was within the lines of the American Army, to which Vera Cruz surrendered on the 29th of the same month. On the 1st of April she was surveyed by two ship-masters at the captain's request, and on their recom-

mendation she was sold on the same day by an auctioneer who derived his commission from the Commander in Chief of the forces. The hull sold for \$180, and the rigging, &c., for \$135. The purchaser succeeded in getting her off, and conducted her to New Orleans where she was repaired, and a new register having been obtained for her from the Custom House, (by what authority is not in proof) she was transferred by formal bill of sale to Messrs. Andrews and Dewey, the present claimants, for the sum of \$2750. Having subsequently prosecuted a voyage to Philadelphia, she was arrested here on the 20th of July last, at the instance of the former owners, who now seek to recover possession of her.

The sale, it is conceded, is to be regarded as a sale by the captain, and the claimants are purchasers with notice, whose title is of course identical with that of their vendors. If the proceedings at Vera Cruz did not divest the ownership of the Libellant, he is entitled to a decree.

The law is fully settled that the sale of a ship by the master, passes no right whatever, unless it is enjoined by policy so clear and obvious as to be equivalent to a moral necessity, and unless it has been conducted in entire good faith.

The existence of this necessity is an element of the purchaser's title,—not a circumstance to be presumed from the integrity of the transaction, but to be proved as an independent fact. The *bona fides* of the sale is of course an equally important element; but this under ordinary circumstances will be presumed; or to speak more accurately, the law will not impute *mala fides*, where there is no evidence of imposition or collusion, or of such want of care as implies a disregard of the owner's interests.

Yet it is the business of him who accepts title under a captain's sale, to look carefully into the fairness of the whole dealings, for a very little matter may devolve

on him the necessity of sustaining it by proof. He must see to it, not merely that his bargain will pass the ordinary inspection of the market, without being condemned as tainted, but that it is without reproach or just suspicion.

He buys of one to whom the owner has not delegated the power of sale, and who derives his authority from a combination of facts, some of them indeed notorious, but the extent and force of others known for the time only to the party selling. The captain in passing away the owner's title to a ship is an agent constituted by necessity.— If he has the means of reserving his vessel, he has no right to sell her. If he has opportunity of communicating with his owners or their agent, without periling the property in the mean time, he has no right to anticipate their instructions. He knows, or ought to know better than any one else, what is the condition of his vessel, what injuries she has sustained, and to what extent she may be further injured by continued exposure—what means of rescue are at his command, what is the efficiency of his crew and the goodness of his tackle, what moneys he has and what moneys he can procure, with which to engage assistance from others—where his owners live, and who are their nearest correspondents. The purchaser therefore relies even for the evidence of that necessity, which is the basis of his title, upon the perfect good faith of the master.

And rightfully ship owners have no security for the return of their property from the "remote regions of the sea," but in that principle of the universal Law Maritime, which looks to the muniments of their title, when verified by National authority, as controlling notice of ownership to all the world. In the absence of express sanction from the owner, it must be a clear necessity that justifies even

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the hypothecation of a ship for the purpose of enabling her to complete her voyage ; a necessity even more stringent must be invoked to vindicate the abandonment of the voyage and the unauthorized alienation of the ship together, to give validity to either transaction, the most perfect good faith should preside over it, in its inception and throughout its progress.

In the case before me, the libellant denies both the necessity of the sale and the good faith of the master ; and he has adduced proof on both points, by depositions which passed publication several months before the hearing.—The claimants on the other hand have examined numerous witnesses to show that the sale was perfectly fair, that the necessity for it could not be averted by the means at the captain's command, and that it would have been hazardous to postpone it.

I have examined these voluminous proofs since the very able arguments which were made upon them by the counsel on both sides before me ; and if they included all the evidence of which the case is susceptible, or which a Court has the right to ask for, I confess that the inclination of my mind would be towards sustaining the sale.—But there is wanting to the case of the claimants, as now presented, a very important item, in the absence of which, unexplained, I cannot decide in their favor. It is the evidence of the captain himself.

I have already indicated the circumstances, indispensable to the establishment of the claimant's title, which are best known to the captain only. Besides these, the depositions show that he is in possession of the Surveyors' report, which recommended the sale ; the general recollections of one of the Surveyors, testified to after the lapse of eight months, do not adequately supply the want of this document. Not that the report itself would be primary evidence to support the sale ; but as a record made

by a witness at the time of the transaction, it would serve to refresh or to correct his memory, and increase greatly the value of his testimony.

But above all, on the question of the integrity of the sale directly put in issue by the libellant, the captain's evidence is vital to the claimant's case. I can scarcely imagine a state of circumstances in which the rights of a litigant party being absolutely dependent on the good faith of a third person, that good faith can be regarded as adequately vindicated against assault, without an appeal to his conscience, if he be alive and accessible.

I therefore sustain the libel; and regarding the claimants as affected by the want of good faith in the sale at Vera Cruz, I am indisposed to recognize a credit in their favor for the amount expended by them in the salvage or melioration of the vessel. This question, however, not having been fully discussed at the hearing, I will, if the proctor for the claimants desires it, entertain a motion for a rehearing of this branch of the case. I adjudicate against his clients with the less reluctance; inasmuch as being now advised of what I esteem the defects of their case, they will be enabled to supply them so far as the truth shall warrant, should they see proper to invoke the revisory action of the Circuit Court.

Per Cur. Decree for Libellant.

New Jersey Supreme Court--July Term, 1849.**VANDEGRIFT vs. REDIKER.*****IN TRESPASS—ON CERTIORARI.**

1. An engineer in charge of a locomotive engine, held not to be liable for an accidental injury to a cow, which, suffered to go at large, had strayed on the railroad.

2. The owner of cattle is bound to keep them in his own close at his peril; and nothing but wilfulness on the part of the engineer would make him liable for the loss of a cow, so exposed by the fault of the owner.

This was an action of trespass brought before a Justice of the Peace of the county of Burlington, against the plaintiff in Certiorari, (who was defendant below,) an engineer in the employ of the Camden & Amboy Railroad Company. The action was brought against him for killing the cow of the plaintiff below, by running against her with a locomotive then in charge of the defendant. The Justice gave judgment for the plaintiff below, and the defendant appealed to the Court of Common Pleas. On the appeal the judgment was affirmed by consent, a state of the case being agreed upon in order that, upon certiorari, the cause might be settled in this Court, upon the law as applicable to the facts. It was agreed that if the Supreme Court, upon the whole case, should be of opinion that the plaintiff was entitled to recover the judgment of the Pleas should be affirmed with costs; if otherwise, that the judgment should be reversed.

The evidence taken before the Justice was fully stated, but it is unnecessary to repeat it at length. A short summary seems to be sufficient. The cow of the plaintiff be-

* The Editors of Am. Law Jour. are indebted to Joseph P. Bradley, Esq., one of the learned counsel who argued this case, for the excellent report here presented to the reader.

low was at large and had strayed on the railroad at an unenclosed part of the road near Bordentown, and just as the train at its usual speed was approaching the spot. It was an excursion, and not one of the regular trains. The railroad at the place where the accident occurred runs along side the public road, and one standing on the track at that point can see down the road more than one-fourth of a mile. A witness who saw the cow come from the woods and walk on the railroad alone, said he heard the approach of the cars and the bell ring once before the cow was struck. A passenger in the train said he heard the bell tap twice, that the engine was reversed and the speed stopped. He said that from the tap of the bell until the accident occurred was but a few seconds; that the locomotive was not thrown off, or the train much detained, and that the engineer was a careful man.

Bradley & Wall for the plaintiff in Certiorari.

If this was not a case of inevitable accident, at any rate there was no wilful design, or such gross negligence as to amount to wilfulness. It may be admitted, that if the act had been wilful, the engineer would be liable; but short of wilfulness, the cow being illegally on the road, he is not liable. Every man is bound to keep his cattle on his own close. (*Chambers vs. Matthews*, 3 Harrison's R. 368; *Coxe vs. Robbins*, 4 Halsted's R. 384; *Stafford vs. Ingersoll*, 3 Hill's N. Y. Rep. 38; *Lyman vs. Gibson*, 18 Pickering's R. 427; *Dovaston vs. Payne*, 2 H. Black. 527; 3 Blacks. Com. 209, 211; 3 Kent's Com. 438.) The engineer was shown to be a careful man, and he was in the performance of a lawful duty. (*Charter of the Company and Turnpike Co. vs. Railroad Co.*, 2 Harr. R. 314.) It cannot be presumed, therefore, that he would wilfully put in peril his own life, and the lives of the passengers in his train. And no amount of mere carelessness will make a man liable as a trespasser, who is lawfully employed on

his own property, or where he hath good right to be, to one who comes there illegally. (Bush vs. Brainard, 1 Cowen's R. 78; Blyth vs Topham, Cro. Jac. 158, S. C. 1 Roll. Ab. 88; Ilott vs. Wilkes, 3 Barn. & Ald. R. 304; Sarch vs. Blackburn, 4 C. & P. 297; Burckle vs. N. Y. Dry Dock Co., 2 Hall's Superior Ct. R. 151; Rathbone vs. Payne, 19 Wend. R. 399; Brown vs. Maxwell, 6 Hill's R. 592; Burroughs vs. Housatonic R. R. Co., 15 Conn. R. 124; Deane vs. Clayton, 7 Taunt. 489, judgments of Just. Park, and Ch. Just Gibbs.) The case differs widely from those of ordinary collisions on a public and common highway, by land or water, where both parties have an equal right to be; though if judged by the *principle* which prevails in *those cases*, the defendant would not be liable. Lynch vs. Nurdin, 1 Adolp. & Ellis N. S. 29; Butterfield vs. Forrester, 11 East 60; Bridge vs. Grand Junction Railway, 3 Mees. & Welsb. 244; Davis vs. Mann, 10 Mees. & Welsb. 546; Wakeman vs. Robinson, 1 Bingh. R. 213; Vanderplank vs. Miller, 1 Moody & Malk. 169; Luxford vs. Large, 5 C. & P. 421; Woodrose vs. Sims, 2 Dodson's Adm. R. 85. Judgment of Lord Stowell; Rathbone vs. Payne, *qua supra*; Davis vs. Saunders, 2 Chitty's R. 639.) Besides, it is contended that this was a case of involuntary trespass, or inevitable accident, which never renders a party liable to an action. Millen vs. Fawdrey, Poph. 161, S. C. Latch 13, 119; W. Jones, 131; Weaver vs. Ward, Hobart's R. 134; Scott vs. Shepherd, 3 Wils. 403, S. C. 2 W. Black, 892; Brown vs. Giles, 1 C. & P. 118. Many cases in the books, which might at first sight seem against us, have depended on the form of pleading; it being held that in trespass, inevitable accident must be specially pleaded where the injury *resulted* from a *voluntary* act of defendant; though where he was merely an instrument of some over-ruling necessity, his will not concurring in the act from which the injury re-

sulted, he may plead *not guilty*. (Hall vs. Fearnley, 3 Ad. & El. N. S. 919.) Those cases cannot apply here because no special pleading is required in a Justice's Court in New Jersey, and because we have set the special matter forth in the plea, if it ~~were~~ required.

Gov. Vroom, Contra.

The cause was argued in April Term last, before Justices NEVIUS, CARPENTER and RANDOLPH, and the unanimous opinion of the Court was read at the present Term by CARPENTER, J.

When the act charged as a trespass was committed, whether that act was accidental or otherwise, the defendant, an engineer, having charge of a locomotive, was engaged in the regular performance of his duty. This duty was a lawful one, and the company in running the engine on its railroad was clearly within the powers granted by its charter. The road had been built and engines and cars placed thereon for the purpose of transporting passengers and merchandize by means of steam power, in exact conformity with the object of the act of incorporation. Turnpike Co. vs. Camden & Amboy R. R. Co. 2 Har. 314.

The duty then in which the defendant was engaged being lawful, neither he nor the company could be liable for any accidental injury which might occur in consequence of the passage of the train, unless there was a want of diligence and precaution, or the right was exercised in an unlawful and unreasonable manner. Undoubtedly, a company entrusted with an agent of such dangerous character for its private and particular advantage, must use all reasonable diligence to prevent damage to the property of third persons. If negligent, of course the company would be liable for all consequent injury to any one who had not deprived himself of his remedy by some default or misconduct on his own part. Burroughs vs. Housatonic R. R. Co. 15 Conn. R. 124; Garrison vs. Rail

road Co. 2 Iredell (N. C.) 324; Piggott vs. Eastern counties Railway Co. 3 C. B. 229.

But the case shews that the cow was unlawfully at large, straying without control in a public thoroughfare when killed by the locomotive. At the common law, it is well settled, that a man is not obliged to fence against any cattle, unless indeed it be against cattle rightfully in an adjoining close, but the owner is obliged to keep them in his own close at his peril. The statutes of this State which prescribe the regulations as to fences, extend only to owners of adjoining closes, and owners of land are not compelled to protect themselves against trespasses committed by cattle suffered to wander at large and pasture upon the public roads. The rule, it seems to me, must apply to a lawfully authorized railroad as well as to other property. In this case, it does not appear that the cow had escaped from the owner without any fault on his part or that he had made fresh pursuit. Any injury that might occur in case of such accidental escape, or that might occur to cattle being driven along the public highway, in consequence of the unfenced railroad, might admit of a different consideration. But in this instance the cow when struck was trespassing, so far as appears, without excuse, upon the property of the company. *Coxe vs. Robbins*, 4 Halst. 384; *Chambers vs. Matthews*, 3 Har. 368; *Rust vs. Low*, 6 Mass. 90; *Stackpole vs. Healy* 16 *ib.* 33; *Stafford vs. Ingersoll*, 3 Hill 38.

Under such a state of facts nothing but wilfulness on the part of the engineer, or such negligence as would amount to wilfulness, would make him liable for the loss of the cow so exposed by the fault of the owner. It was properly admitted by one of the counsel on the argument that had the injury been wilful, the defendant would have been liable, and undoubtedly such is the rule. See *Brownel vs. Flagley*, 5 Hill, 282; *Lord Denman*, in *Lynch vs. Nur-*

din, 1 Q. B. 38; *Davies vs. Mann*, 10 M. and W. 546; *Butterfield vs. Forrester*, 11 East. 60. But in case of mere negligence not so gross as to evince recklessness or design, an action cannot be maintained by one, himself clearly in the wrong. It has been so held in cases arising upon the collision of carriages and vessels, as well as in other cases which present a strong analogy. There must be wrong as well as damage, and there is no legal injury where the loss is the result of the common fault of both parties.—*Rathbun vs. Payne*, 19 Wend. 399; *Barnes vs. Cole*, 21 *ib.* 188; *Butterfield vs. Forrester*, *supra*; *Sarch vs. Blackburn*, 4 C. and P. 297; *Vanderplank vs. Miller*, 1 Mood and Malk. 169.

It does not appear that there was any culpable negligence on the part of the engineer in the present instance. It is said in the evidence as stated that he was a careful man. According to the testimony of a passenger in the train, the bell was twice tapped, and the engine reversed, though, the whole occurrence being sudden, the collision almost immediately succeeded the notice thus given. We cannot presume that a careful man, charged, as was this defendant, with the safety of the numerous passengers in the train, would have periled their lives by wilfully running against a cow previously seen. The only circumstance which can give the least color to such a charge, is that the line of road, at the point where the accident occurred, could have been seen by the engineer from the distance of one-fourth of a mile, perhaps farther. But the train was in rapid motion. The exigencies of the business to which railroads at this day are applied, require as much speed as is consistent with safety. The cow, alarmed by the approach of the engine, may, at the moment, have darted on the road, so that the view of the danger by the engineer, and the collision, may have been almost simultaneous. We do not think, therefore, that

this circumstance will authorize us to infer such gross negligence as will make the defendant liable. We are of opinion that the judgment below must be reversed

Supreme Court of New York.

SPECIAL TERM, JANUARY, 1849.

Before Harris, Watson and Parker.

PILLOW AND WIFE, vs. BUSHNELL AND OTHERS.

In an action by husband and wife, for an assault on the wife, the defendant can not require the wife to testify as a witness, but he is at liberty to give in evidence that the act complained of was done by the consent and request of the wife, and if such facts are proved, they constitute an entire defence.

This was an action for assault and battery on the wife, tried at the Columbia Circuit, October, 1848.

The plaintiffs, some time after their marriage, had joined the society of Shakers at New Lebanon. The husband abandoned the society, and afterwards, in August, 1847, went to New Lebanon for the purpose of taking away his wife. She was unwilling to leave, and the assault and battery charged was, that the defendants had rescued the wife from the husband, when he had her by the arm taking her out of the house. The defence was, that, in what the defendants did, they acted by the consent and at the request of the wife.

After the plaintiffs rested, the defendants called the female plaintiff as a witness, to prove the defence. The plaintiff's counsel objected, on the ground that she was

called in hostility to the husband's claim, and contended that she was not a competent witness against the plaintiffs. The Court overruled the objection and admitted the wife as a witness, and the plaintiff's counsel excepted.—The Judge, among other things charged that the wife was necessarily a party on the record—that the declaration alleged the assault to have been committed on her, and she was therefore the meritorious cause of action; and that if the jury were satisfied that no assault had been committed upon her, or that what was done by the defendants was with her consent and concurrence and by her desire, they must find for the defendants, for if she being the party assaulted, consented to the assault, the action would not lie. The plaintiff's counsel excepted to that part of the charge which held that her consent constituted a defence. The jury found for the defendants.

M. Sanford, for Plaintiffs.

C. L. Monell, for Defendants.

By the Court. PARKER, J.—The first question is whether the wife was a competent witness against the plaintiff.

At common law husband and wife are excluded from giving evidence for or against each other. They cannot be witnesses *for* each other, because of the identity of interest; nor *against* each other, on a principle of public policy, which deems it necessary to guard the security and confidence of private life, even at the risk of an occasional failure of justice. 1 Phill. Ev., 77; Cow. & Hill's Notes, 147, note 142; Greenleaf's Ev., §§ 334, 353.

Under this general rule, it has been frequently held that when the husband is a party, the wife can not be a witness either for or against him; (2 Haw. c. 46; 2 Hale, 279; 2 Str. 1095; Fitch vs. Hill, 11 Mass. Rep., 286; City Bank vs. Bangs, 3 Paige, 36;) and where the defendant married one of plaintiff's witnesses after she was actually

summoned to testify in the suit, she was held incompetent to give evidence. *Pedley vs. Nellerby*, 3 Car. & P., 558.

The exceptions to this rule are very few, and arise from the necessity of the case; as where the wife is admitted to prove violence to her person committed by the husband. *Greenleaf's Ev.*, § 343.

So careful is the law to preserve inviolate the confidence between husband and wife that even after the marriage has been dissolved by divorce *a vinculo matrimonii*, the wife, although she may be sworn, and is a competent witness as to some matters, is not permitted to disclose conversations, or facts that transpired during the cohabitation; *Monroe vs. Troistleton*; *Peakes ad. Cas.*, 219; *Stute vs. Phillips*, 2 Tyler R., 374; *Radcliff vs. Wales*, 1 Hill, 63; and the same principle was applied where, after the death of the husband, the wife was called as a witness against the administrator. *Babcock adm. vs. Booth*, 2 Hill, 181. It is certain that if the suit were brought by the husband alone, his wife could not be a witness either for or against him. But in this case the wife is a party plaintiff. The suit is brought for an injury to her person and she was necessarily joined with her husband as plaintiff; and being a party, it is contended on the part of the defendants that she is made a competent witness by statute.

By the act of 1847, (Laws of 1847, p. 630,) it is provided that any party in any civil suit, &c., may require any adverse party, whether complainant, plaintiff, petitioner or defendant, or any one of said adverse party, to give testimony under oath in such suit or proceeding, in the same manner as persons not parties to such suit or proceedings and who are competent witnesses therein.

An enactment substantially the same, though in different language, is found in § 344 of the Code. This section is made applicable to suits pending at the time the Code of Procedure took effect, and this suit belongs to that class.

The language of the act of 1847, if literally construed and without reference to other guides which we are to consult in giving a construction to statutes, might admit of the application claimed by the defendants; "any adverse party," is an expression broad enough to include every individual made a party, no matter what may be his relation to another party. But statutes must be expounded according to the meaning and not according to the letter. 1 Cent. Com., 462; Dwarris on Stat. 552, 557; Smith's Com. on Stat. § 480, § 515, § 550; Gilman's Dig. 187, § 5. It is clear that the object of this statute was simply to remove the technical objection that existed under which a person could not be compelled to testify, because he was a party to the record; and that the only disqualification intended to be removed was that which arose from the fact of being a party to the record. It can no longer be objected by the witness that he is a party to the suit—but if there be any other disqualification, it is not removed by the statute.

I am unwilling to suppose it was the intention of the Legislature to destroy by implication, and without any enactment clearly expressing such design, the ancient, well settled and most salutary rule of law, which precluded both husband and wife from being witnesses against each other. The reasons, which for centuries have sustained this rule of evidence against infringement are no less cogent now than formerly. At no former period has it been more emphatically the dictate of sound public policy to preserve the sacredness of the marriage relation, by protecting its confidence and guarding against discord and dissension. The act of 1847 is not expressly repealed by the Code, but if there is any substantial difference in the language of the two acts, the latter would seem to give a legislative construction to the former, if indeed it does not

virtually supersede it. I do not however think it material to decide this point, having come to the conclusion that the true construction of this new provision, even upon the language used in the act of 1847, does not render the wife a competent witness. An analagous construction was given to the Statute of Gloucester, c. 5.

If the statute is to be construed as making every party a competent witness on the call of the adverse party, then it would remove the disqualification of several classes of persons now incompetent, such as insane persons, idiots, children who do not understand the moral obligation of an oath, and others. This could never have been intended. It is not claimed that the wife could have been called against her husband in a suit brought in his name alone, can it be that making her a party renders her competent? If so, then a witness is qualified to testify by the fact of being made a party to the suit. A wife not a party is incompetent, but a wife who is a party and thus has what was formerly an additional disqualification is a competent witness. Though the same reasons for excluding her as a witness are equally applicable in both cases.

I am well satisfied the Justice erred in receiving the wife as a witness.

I am equally well satisfied that the charge was correct. If the act complained of as an assault and battery was committed by the consent and request of the wife, it formed an entire defence. 2 *Code*, R. 20.

CHEMUNG COUNTY COURT—N. YORK.

HOFFMAN *and others*, vs. STEPHENS.

A, being insolvent, assigned his debts, &c., to trustees for the benefit of his creditors. In an action brought by the trustees to recover a debt due to the estate, held reversing the decision in the Justice's Court, that A. could not be a witness on behalf of the plaintiff.

This was an appeal by the defendant against a judg-

ment rendered in a Justice's Court in favor of the plaintiffs. The defendant was indebted to one Reynolds, who becoming insolvent, assigned his estate (including the debt due him from the defendant) to the plaintiffs, upon trust for all his creditors. On the trial, Reynolds was offered as a witness on behalf of the plaintiffs, the now respondents; objected to on behalf of the defendant, the now appellant, on the ground of immediate interest in the result of the suit. Reynolds executed a release to the plaintiffs of all his immediate and reversionary interest in the subject matter of the action. It appeared, however, that the liabilities of Reynolds amounted to about \$4,000; and his assets, supposing the whole to be realized, to about \$2,500. The defendant persisted in his objection, notwithstanding the release; but the justice admitted Reynolds to testify, and gave judgment for the plaintiffs.—From this judgment the appeal was brought.

A. Robertson, for appellant.

G. A. Brush, for respondents, cited *Plank Road Com., vs. Rice*, 1 Code R. 108; and *Farmers' Bank vs. Paddock*, *ib.* 88.

J. W. WISNER, County Judge. The case shows the liabilities of Reynolds to be about \$4,000, and his assets about \$2,500, making him insolvent some \$1,500. There could not, therefore, be any contingent or reversionary interest in the witness to release. A release to divest him of all interest should have been made by the creditors to him.

Prior to the Code, it was well settled that an insolvent whose future effects were liable for his debts, was incompetent to prove a debt or claim assigned, unless released from all his liability.

It was contended, on the argument by the respondents, that Reynolds had no immediate interest in the claim on which the suit was brought, and was not within the 399th

section of the Code. I can scarcely conceive a case in which a witness could be immediately benefitted by a recovery, if this case is not one. It is surely beneficial to him to have his debts paid; and whatever is subtracted from the assets in the hands of his assignees, leaves that amount for which his future effects are liable. Suppose this debt, on which this suit was brought, was the only one witness assigned, has he not an immediate interest or benefit in the recovery? The answer is obvious. The judgment in plaintiffs' favor would lessen his liability to the amount of the recovery. The judgment is reversed. 2 *Code Rep.* 16.

In the Supreme Court of Penn'a.—Northern Dis.

JULY TERM, 1849.

1. The guardianship of females under age is terminated by marriage, and the husband, before the act of 11 April, 1848, relative to the rights of married women, might call on the guardian to settle his account and pay him the balance; but that act has worked a radical change in the condition of femes covert.

2. By the act of 11th April, 1848, a married woman must be considered a feme sole in regard to any estate of whatever name or sort owned by her before marriage, or which shall accrue to her during coverture, by will, descent, deed of conveyance or otherwise; and the husband is not entitled to the possession of his wife's funds.

3. Her consent, being a minor, is of no avail.

In the case of the application of Dr. A. S. Cummings, for a Decree against Henry Hilbisch, Guardian of his wife.

Appeal by Dr. Albert S. Cummings, from the definitive Decree of the Orphans' Court of Union county, on his application to said Court to decree that Henry Hilbisch, the guardian of his wife, should pay over the money and transfer the securities in his hands.

PETITION.

To the Hon. the Judges of the Orphan's Court of Union county, at May Term, 1849.

The petition of Albert S. Cummins, intermarried with Louisa, one of the daughters of Peter Richter:

*Respectfully Represents:—*That Henry Hilbisch, who is

the testamentary guardian of said Louisa, has filed his account, which has been confirmed absolutely at the present term, by which it appears that the balance in his hands is as follows :

Balance in money, - - -	\$1,435 74
A House and Lot for which the Guardian holds the title papers, amounting to	1,560 00
	<hr/>
	\$2,995 74

Your petitioner further represents, that although the said Louisa is still in her minority, between the ages of fourteen and twenty-one years, he conceives that by the marriage, which has taken place since the death of her father, the relation of guardian and ward has been virtually dissolved, and that he is entitled, in virtue of his marital rights, to assume the care and management of his wife's property, in such way and manner as shall be most conducive to her interest, and under such restrictions as are provided by the laws of this Commonwealth. He further represents that the said Louisa is willing and desirous that he should take charge of her property as aforesaid, as is witnessed by her written consent and acknowledgment herewith presented.

Your petitioner therefore prays your Honors to make a decree directing the money and securities for money and other personal property in the hands of the guardian to be paid and transferred to him, for the use and benefit of his said wife ; and also directing the said guardian to transfer the deeds and other papers relating to the real property to the said Louisa.

And he will pray, &c.

ALBERT S. CUMMINGS.

In connection with the above petition was offered the written consent and acknowledgment of the wife, upon which the court endorsed as follows :

"It being made to appear to the court that Louisa Cum-
VOL. IX.—No. 8.

tings is a minor, the acknowledgment offered above is refused to be taken. May 25, 1849."

DECREE.

May 25th, 1849, Court refuse to make the order requested, and refuse to decree the money, &c., to the petitioner.

By the Court.

From this decree the petitioner appealed and the opinion of the Supreme Court, was delivered on the 2d August, 1849, by ROGERS, J. Testamentary guardianship is not determined by the marriage of a male ward, but the guardianship of females is terminated by marriage. This is a well settled distinction. The latter is the necessary consequence of the rights a husband acquires with regard to his wife's person and property. By marriage he acquires an absolute, unqualified right to her personal property, to her choses in action when reduced to possession, and to the possession of her real estate. For this reason it is ruled that although she is still in her minority, he may call on the guardian to settle his account, and pay him the balance. 2 Whar. Dig. 406, pl. 27. Macpherson on Infants 90, 41. Law Library 2 P. W. 103, 1 Ves. 90. These are acknowledged principles of the common law, necessarily resulting from the marital relations; but do they apply in the case of female wards since the passage of the act of the 11th April, 1848; an act intended to secure the rights of married women. By that act, which seems to meet general approbation, with but few exceptions, a married woman must hereafter be considered a feme sole in regard to any estate of whatever name or sort, owned by her before marriage, or which shall accrue to her during coverture, by will, descent, deed of conveyance, or otherwise. The act works a radical and thorough change in the condition of Females Covert. She may dispose of her separate property by will or otherwise as a feme sole.— Her property is hereafter exempted from levy and execu-

tion for the debts or liabilities of her husband, except in specified cases. Her estate whether real or personal, cannot be sold, conveyed, mortgaged, transferred, or in any manner incumbered by her husband, without her written consent, duly acknowledged before one of the Judges of the Court of Common Pleas, that such consent was not the result of coercion on the part of the husband, but the same was voluntarily given, and of her own free will. In short, unless with her assent the husband has no control over her estate, except as her agent, and by authority derived from her. Notwithstanding this act, however, the petitioner insists that by his marriage, which has taken place since the decease of his wife's father, the relation of guardian and ward is virtually dissolved, that he is entitled by virtue of his marital rights, to assume the care and management of her property, in such way and manner as shall be most conducive to her interest, and under such restrictions as are provided by law. Although the application is stated to be made with the approbation and consent of his wife, yet it is very obvious her assent gives no additional validity to the claim, for being a minor, she is incapable of giving consent. If it should happen that her estate is dissipated by an improvident husband, she would have the same legal rights notwithstanding to complain of the conduct of her guardian for a violation of duty, in surrendering a trust committed to him by her deceased parent. The petitioner asks the care and custody of her property, solely by virtue of his marital rights, without any complaint against the performance of the trust, on the part of the guardian. It is that pretension alone which we are called on to decide.—It is not difficult to understand the distinction between male and female wards on the principles of the common law. It results necessarily from the marital relations that the husband should have the custody and control of the

wife's property, as well as her person, for the satisfactory reason that by the marriage he acquires a present interest in her real and personal estate ; but it is not easy to perceive how the same consequences should follow when by an alteration in the law the marriage ceases to confer on him any title whatever to her estate. And this is the state of the question since the passage of the act. The husband, it is true, claims the management of the estate as her trustee. But this pretension, if acceded to, will inevitably interfere with the working of the act, for I know of no restrictions provided by law which will effectually guard her rights. If her funds are suffered to go into his hands, under any conditions which the Court may impose, it is easy to perceive how readily the intention of the Legislature may be eluded from the difficulty she would experience in the case of an unprincipled husband in requiring and acquiring that possession and control of her separate estate which he here contemplates. To the testamentary guardian her father has given the care and custody of her estate. Of this trust he cannot divest himself, nor can he be compelled to relinquish it until she acquires by time, a legal capacity to act for herself. It is plain, under the provisions of the act, when she obtains her majority the settlement must be made with her, the payment to her, or her authorized agent, in the same manner as to a feme sole. It is possible, though I suppose not probable, that when that time comes, she may not be as willing as it appears she now is, to entrust the care and management of her estate to the custody of her husband. But be this as it may, we have the plain directions of the act for our guide. The testamentary guardianship from necessity is determined so far as respects the control of her person, but nothing more. That is the plain result of the marriage contract ; but since the passage of the act the same rule cannot extend, for the rea-

sons given, to her property. In this act we see no difference between male and female wards. This presents a fair case for the application of the principle *cessante ratione, cessat ipsa lex*. Decree affirmed.

A. Swineford, for appellant.

Slenker & Casey, for appellee.

District Court of Allegheny County--Penn'a.

SAMUEL McMUNN vs. ROBERT CAROTHERS.

DEBT ON SINGLE BILL.

1. The old common law process of interpleader is not abolished, though it is but seldom used.
2. The principles and practice of interpleading.

Mr. Shaler, counsel for defendant, suggests that the defendant does not dispute the claim of the plaintiff, but is ready to pay it, but that the money is claimed to belong to Charles Stevenson, administrator of Richard Stevenson; it being the proceeds of a tract of land sold by said Richard Stevenson to Daniel McMunn, who conveyed the same away for the purpose of defrauding his creditors, and that the plaintiff purchased knowing the fraud, and sold to the defendant who did not know of it, and that the said Stevenson had a judgment which was a lien upon the lands in the hands of the fraudulent vendee and therefore upon the money due by the defendant, an innocent vendee.

Mr. Shaler, thereupon moves that Charles Stevenson,

administrator, &c., have leave to come in and interplead for his rights. 4 Rawle 100.

Mr. McCandless, contra.

Dec. 30, 1848. By the Court, LOWRIE, J.

That the old common law process of interpleader is not abolished, though it is but seldom used, is apparent from all our decisions as to these ancient forms. They may still be used where they furnish an appropriate remedy. And perhaps I may be indulged in saying that our Supreme Court has manifested an expanded and expansive liberality in moulding these old forms into conformity with modern practice. *Barnet vs. Ihrie* 17 S. & R. 211, *Wetherow vs. Keller* 11 S. & R. 271, 274, *Hurst vs. Fisher* 1 Watts & S. 438, *Day vs. Hamburg*, 1 P. A. Brown 82, *Watson vs. Mercer* 17 S. & R. 344. *Durand vs. Halbach*, 1 Miles 46, *Share vs. Becher* 8 S. & R. 242, *Heller vs. Jones*, 4 Binn. 61.

In many cases the principle of the action has been introduced in another form, and in almost all cases where the form has been introduced it has been altered to suit the character of our institutions and habits.

And, though in England the common law interpleader process was principally confined to the action of detinue, yet in equity the principle was as wide as the demands of justice required. And the principles of equity being a part of our common law, our interpleader is no less expansive in its principles than the equity process. *Coates vs. Roberts*, 4 Rawle 100.

Nor am I able to discover that the common law procedure is any less efficient in its forms; and where a suit is actually brought against the stakeholder or middleman, it seems to me that the common law form is the most simple, speedy and economical. Where a suit is only apprehended the stakeholder or middleman can protect himself by his bill in the equity form.

Under our practice, where the middleman is sued, he may take the simple course of giving notice to another claiming the money or thing in controversy, to come in and defend the action or be barred of his claim. But this does not conclusively save the middleman from his liability to action by the other claimant, for the latter not being a party on the record is not barred by the judgment, until the fact of notice is properly proved. The middleman is not, therefore, conclusively protected by such judgment; for his proof of the notice may fail him. Besides, if the middleman fail, he may have to pay the costs himself, without any recourse.

It would therefore seem more prudent for the defendant to pursue the regular common law form of coming in and filing his petition or suggestion, admitting the debt or duty, and his willingness to pay or perform, and stating the claims of the third person, and pray for a *scire facias* to bring him in to interplead. Thus the third person, called the garnishee (from being the person warned) is compelled to come in and set up his claim, and is concluded by the proceeding, without extraneous proof.

We have been so much in the habit of applying the word garnishee to the person holding the property in dispute in the case of an attachment, that I venture to call the third person in case of interpleader, *an intervenor*, as a person occupying a similar relation is called in other parts of the law. *Clement vs. Rhodes*, 3 Addams' Ecc. R. 37. *Brotherton vs. Hellier*, 1 Lee Ecc. R. 509, 2 Domat 676. 1 Poth. Proceed, Civ. 74.

By the service of the *scire facias* the intervenor actually becomes a party, and if he make default, the plaintiff will have judgment to recover the money or thing claimed from the defendant, and his damages and costs from the intervenor. If the intervenor comes in and disclaims, the plaintiff recovers of course. If he defends, unsuccessful-

ly, the plaintiff will have judgment for the thing claimed against the defendant, and for his costs and damages against the intervener. If the intervener plead the issue to the court or jury is between him and the plaintiff, and the defendant stands aside altogether and has nothing further to do but pay the money or deliver the thing sued for according to the judgment of the court.

If the plaintiff recover he has judgment against the defendant for the thing claimed and against the intervener for damages and costs, and if the intervener recover he shall have judgment against the defendant for the thing claimed, and against the plaintiff for his damages and costs. If, however, the money be in court, the judgment of course is that the party recovering shall take it out of court. Usually when the suit is for money, the defendant offers to bring it into court, and often does bring it; and if it is for some other thing he keeps it safely to abide the order or judgment of the court.

If the middleman be sued by two claimants severally, he must sue out his scire facias to interplead in the suit first brought, or if they are both brought at once, then in the one in which the declaration shall be first filed or which the court shall direct.

The principles will be found fully stated under the titles, garnishee, enterpleader and interpleader, in Jacob's Law Dictionary, and in the Abridgements of Brooks, Fitzherbert, and especially Viner and 2 Mod. Entries 425 b. And it is very easy to see how largely the court of Chancery has drawn upon the common law principles for its guidance in the much more modern equity procedure.

And the principle of interpleading is scattered all through our law. As where heirs, devisees and terre tenants come, in one notice by writ or by the party, to defend for their interests. Where a warrantor or landlord comes in on notice to defend an action of ejectment and other

cases. And where the principle is so clearly a part of our law, I am not able to see why we should reject the aid of an old and simple form ready made for our use, merely because it has long been out of use. It recommends itself to our attention by the fact that there is no more simple and effective mode of proceeding in any part of our practice. We must therefore grant leave to come in and interplead. As it is a voluntary appearance by the intervener we make a special

ORDER:

It being here suggested to the Court by Mr. Shaler, counsel for the defendant, and also for Charles Stevenson, administrator of Richard Stevenson, dec'd., that the claim of the plaintiff in this case is not disputed by the defendant, and that he is willing to pay the same into Court, and that the said Charles Stevenson, administrator &c., is in law entitled to have and receive the same from the said Robert Carothers by title, to which the said plaintiff is privy, and the counsel having thereupon moved the court that the said Charles Stevenson, administrator, have leave to appear and interplead in said action and set up his claim for the said money, the damages and costs of the said action to abide the event thereof in the same manner as if it had been originally brought against the said intervener, Charles Stevenson, administrator, &c.; the court on hearing the counsel for the plaintiff, do order and direct accordingly.

We are asked by a distant correspondent if we will permit him to review the decision in *Hays et al. v. Heidleberg*, 9th Barr. Certainly—if the review, upon perusal, should appear to be worthy a place in the Journal.

JAMES ROLLA'S CASE.

[Reported for the American Law Journal.]

Where death ensues *beyond* the limits of the District of Columbia, by reason of a blow given *within* the District, the Criminal Courts of the District have no jurisdiction to try the offender for the murder.

James Rolla, was arraigned before Judge Crawford, of the Criminal Court, District of Columbia, upon the charge of murder. It appeared from the evidence that Rolla commanded a small vessel which he plyed on the Potomac. The deceased, whose name was Salsbury, was his mate. An altercation ensued between these two individuals on board of the vessel, which at that time had sails set with a fair wind, and was only a short distance from the wharf at Georgetown, D. C. Salsbury seized a paddle, and it is believed advanced towards Rolla, who had in his hand a heavy piece of wood called a tiller, and used in steering the boat; he also advanced and felled Salsbury to the deck of the vessel by means of this tiller.—Rolla kept on his course until he arrived at a landing beyond the boundaries of the District of Columbia, and here, on board of his boat, Salsbury died. The counsel for defence contended that in as much as the offence was not completed in the District of Columbia—(it appearing that although the murdered man having received the blow in that jurisdiction—he died in another)—that he could not be tried here, if indeed he could be tried anywhere for murder. The learned Judge was of the opinion that Rolla could not be tried in the District of Columbia for murder—but he intimated that he might be properly tried for that crime in the State where Salsbury died. The prisoner was accordingly remanded to jail to await the requisition of the proper authorities. Five or six weeks having elapsed and no requisition having been made, Rolla was brought out under a habeas corpus and discharged.

E. Morgan & Ratcliff, for defence.

New Publications.

REPORTS OF CASES argued and determined in the Court of Chancery of the State of New York. By OLIVER L. BARBOUR. Vol. 3. Published by Banks, Gould & Co., 144 Nassau Street, New York; and by Gould, Banks & Gould, 104 State Street, Albany. 1849.

A SUPPLEMENT to Harrison's Analytical Digest, containing a digest of all the reported cases decided in the Courts of Equity, Common Law, Admiralty, and the Ecclesiastical Courts; and by the Lord Chancellor of Ireland, in the years 1846, 1847 and 1848. By R. Tarrant Harrison, Esq. Vol. 6. Supplement vol. 2. Published in Philadelphia by Robert H. Small, Law-bookseller, 25 Minor Street. 1849.

THE CODE OF PROCEDURE of the State of New York, as amended by the Legislature by an act passed 11th April, 1849; as prepared by the Secretary of State. Published by Gould, Banks & Gould, Albany; and Banks, Gould & Co., New York.

A TREATISE on the Civil Jurisdiction of Justices of the Peace; to which are added outlines of the powers and duties of County and Town Officers in the State of New York, adapted to the Statutes and Code of Procedure; and containing directions and practical forms for every civil case which can arise before a Justice, under the Statutes and the Code. By THOMAS W. WATERMAN, Counsellor-at-Law. Published by Banks, Gould & Co., Albany; and Gould, Banks & Gould, New York.

All these publications appear in a handsome dress; and, when we have room, we shall notice their contents.

BARR'S PENNSYLVANIA REPORTS.

The 9th volume of these reports is before us. It is, as usual, neatly printed on good paper and well bound. But we have fallen upon more typographical errors in this volume than were observed in the preceding ones. An individual who is familiar with the matter, before it goes into the hands of the compositor, is generally a bad proof reader. Knowing what ought to be printed, his mind runs a head of the types and errors frequently escape him which would readily be detected by others less familiar with the contents of the work.

But our friend, the Reporter, has inadvertently, in his syllabus, affixed a very important qualification to the decision in *Dale vs. Medcalf*, p. 108, which is not to be found in the decision itself. In that case, Mr. Justice BURNSIDE has entirely surpassed himself both in style and matter. The great Constitutional principle is broadly affirmed that, a Sheriff's sale on a *fi. fa.* after the return day being void, the Legislature have no Constitu-

tional power to declare it valid, and thus "take one man's land and give it to another." The learned Judge renders, what was certainly due to the profession, an apology for his participation in the decision of *Menges vs. Wertman*, and we hope that his two brethren on the bench, who made up the majority in favor of that decision, will, ere long, discharge the debt which is equally due from all who assented to the doctrine of that case. Indeed, Mr. Justice Burnside displays a trait which is quite unusual with those high in power—he goes far to place the decision of the case of *Menges vs. Wertman* upon its true ground, that of error in the *first* decision of the case by the Supreme Court, which the objectionable act of Assembly was designed to correct. An opinion of so much importance ought not to be marred by an erroneous syllabus limiting the *principle* to the protection of *purchasers*. The invasion of the vested rights of the *original parties* to the controversy is as much forbidden as destroying the rights of *purchasers* under them. The rights of all are equally protected under the constitution and by the decision.

In Tomb's appeal there is quite a judicial "*flare up*" between the Chief Justice and the President of the 8th District. The good natured Chief appears to have had his equanimity so far disturbed by the remarks of the President below, that in order to vindicate the doctrine attacked he goes so far as to order a judgment in favor of parties who had not appealed or otherwise invoked the protection of the Supreme Court.

We may hereafter bestow a further notice on this interesting volume.

A TREATISE on the Law of Patents for Useful Inventions in the United States of America. By George Ticknor Curtis, Counsellor at Law. Boston: Charles C. Little & James Brown. 1849.

Few subjects to which professional attention is called embarrass lawyers more than the law of patents. Many prudent members of the bar decline giving opinions of any kind on the law of patents, and none give them with much confidence, except the very few who have made this branch a peculiar and constant study.

A good modern book was much needed on this intricate and embarrassed branch of legal learning. And such a book has Mr. Curtis given us. It is very evident that this work is indeed "the fruit of careful study." The language of the Preface is highly appropriate and just. "I have endeavored" says the author "to walk carefully by the light of adjudged cases; and although experience has taught me that the Patent Law admits of less reduction to precise rules and axioms than any other branch of Jurisprudence, I have endeavored to indicate the true uses of

the judgments and opinions of the Courts. The opinions and decisions of Judges in patent causes can rarely be treated strictly as precedents, unless they concern the construction of a statute. They are to be regarded as illustrations of the principles of the law, when applied to a particular state of facts; and consequently a precise rule is rarely to be eliminated from them, by separation of the principle from the facts to which it has been applied, unless it is certainly one of general or universal application."

The arrangement of the work is excellent. The preliminary observations are sound, scientific and practical, and will repay an attentive consideration by the general as well as by the legal student. The citation of authorities is very copious, and we believe few if any patent cases of value have been omitted. The index of the cases cited is made as all indexes should be, and is a model.

In an appendix all the United States Statutes are printed at length, and also Judge Cranch's Decisions in cases of appeal from the Commissioner of Patents. Both of these are of great practical value and convenience.

We do not pretend to be very familiar with the law of patents, but a mere cursory examination of the plan and execution of this book, has satisfied us that we hazard nothing in commending it to our professional brethren as a valuable guide and aid among the thorns and brambles that hedge about this intricate branch of jurisprudence.

THE GENERAL LAWS OF PENNSYLVANIA from the year 1700, to April 1849, chronologically arranged, with notes and references to all the Decisions of the Supreme Court of Pennsylvania. Giving construction to said laws. With a copious and minute Index. Second Edition. Compiled by James Dunlop, of Pittsburgh. Philadelphia: T. & J. W. Johnson, Law Booksellers, No. 197 Chesnut street. 1849.

The publishers have favored us at an early day with a copy of this new and improved edition of the public general laws. The first edition proved highly satisfactory to the profession throughout the State, and met the want very generally felt of a good, conveniently arranged and well indexed volume of the public acts distributed in the order of time and embraced within a comparatively small compass.

The notes and references have been confined to the decisions and dicta of our own Courts, and have been designed to illustrate and elucidate the various acts of Assembly. They are brief, carefully stated, copiously cited and conveniently printed in a clear type, at the bottom of the page.—We have taken some pains to examine these citations and have studied one or two acts with the aid of the foot notes, and we heartily thank our friend Mr. Dunlop for a great saving of time and labor.

The amount of time and toil expended on this book must have been enormous. Fourteen hundred pages compactly printed, with foot notes and most commendably faithful side margin notes and an index embracing some two hundred closely packed pages, demands an amount of labor which none but a brother laborer in the same field can fully understand or appreciate. Mr. Dunlap deserves the grateful thanks of his professional brethren for the satisfactory manner in which he has performed a most difficult and irksome task. This edition will unquestionably supersede all other Digests of the Public General Laws, and will be found, as it well deserves to be, on the table of every practising lawyer throughout the Commonwealth. The typographical execution is unexceptionable. We have never seen a book from the Messrs. Johnson's house which deserves warmer commendation in every point of view.

PUBLIC LAWS OF THE UNITED STATES OF AMERICA, passed at the Second Session of the Thirtieth Congress: 1848, 1849. Carefully collated with the originals at Washington. Edited by George Minot, Counsellor at Law. To be continued annually. Boston: Charles C. Little and James Brown. 1849.

We have so recently noticed the public acts of the General Government of the session of 1847, 1848, that we need only refer to that notice (see 1 Am. Law Jour. 525) for our opinion of the value of this pamphlet, which is in every respect like its predecessors, and is indeed intended to form part of the same book. The Statutes at large as printed, annotated and published by our friends Messrs. Little & Brown of Boston, are of immense practical value to the profession, and we doubt not that a ready and extended sale will attest the opinion of the Bar throughout the whole country.

REPORTS OF CASES argued and determined in the English Court of Chancery, with notes and references to both English and American decisions. By John A. Dunlap, Counsellor-at-Law. Vol. 20. Containing the first volume of Younge and Collier's Reports. Published by Banks, Gould & Co., 144 Nassau street, New York: and by Gould, Banks & Gould, No. 104 State street, Albany.

These volumes embrace the period from Michaelmas term 1841, to Trinity term 1842, and contain the decision of Vice Chancellor Sir J. L. Knight Bruce, during that period of time. The English and American notes are numerous and valuable, and the American re-publication is in the usual excellent style of the publishers.

REPORTS OF CASES argued and determined in the Court of Appeals of the State of New York, by George F. Comstock, vol. 1. Gould, Banks & Gould, 104 State street, Albany: Banks, Gould & Co., 144 Nassau street, New York.

The first volume of the decisions of the new Court of Appeals of the State of New York, has made its appearance. It is well printed, on excellent paper, and neatly bound. But, what is of more importance, it is full of matter, rich in interest and highly valuable to the profession. The first case in the book affirms the doctrine that it is the right and duty of a Judge of the Court of Appeals to take part in the determination of causes brought up from a subordinate Court of which he was a member, and in the decision of which he took part in the Court below. Mr. Justice CATON, of the Supreme Court of Illinois, availed himself of this privilege to its fullest extent. Not being satisfied with the decision of the majority of the Court overruling one of his decisions, he is, we perceive, delivering himself of a long dissenting opinion, the *first part* of which is published in the July No. of the "*Western Legal Observer*." It is "*to be continued*." We are entirely unable to say when it will be *concluded*.

PENNSYLVANIA STATE REPORTS, containing cases adjudged in the Supreme Court during May term and part of July, 1848. Vol. 8. By Robert M. Barr, State Reporter. Philadelphia: T. & J. W. Johnson, Law booksellers and publishers. 1849.

This volume contains 555 pages. Although abstracts of most of the decisions contained in it have been already given to the profession in the *American Law Journal*, yet it is all important to the careful practitioner that he should have access to every decision of the Supreme Court at length. The abstracts published in the *American Law Journal*, far in advance of the *State Reports*, are not intended as a substitute for them; but are only to be received as brief notices of what has been decided in order to guard the profession against surprise, to give them the earliest intelligence, and to enable them to obtain more full reports of cases affecting the interests of their clients. The 8th volume of Mr. Barr's reports is rich in its contents and of course is entirely indispensable to the profession in Pennsylvania. The cases appear to be well reported, and the publishers have performed their part in their usual handsome style.

[From the Philadelphia Legal Intelligencer.]

SPEECHES OF DEFENDANTS' COUNSEL and the Charge of Judge BURN-
SIDE, in the case of Hinchman vs. Ritchie, et al. Reported by Oliver
Dyer and Dennis F. Murphy.

We have received from Messrs. E. C. & J. Biddle, No. 6 South Fifth street, a pamphlet of near two hundred pages, with the above title, published for the purpose of showing "more fully than has been done by the public press, the grounds upon which the plaintiff was confined in the Asylum, why some of the defendants were instrumental in placing him there, and why others, particularly those connected with the institution, considered his remaining there as long as he did, necessary and proper." The well known character of Messrs. Dyer & Murphy as reporters, is sufficient evidence of the correctness of their part of the work. The typography is admirable, and reflects great credit upon the publishers. The pamphlet is for sale by the booksellers generally.

REPORTS OF CASES in Law and Equity in the Supreme Court of N. York.
By Oliver L. Barbours, Counsellor-at-Law. Vol. 3. Published by Gould,
Banks & Gould, 104 State street, Albany: and by Banks, Gould &
Co., 144 Nassau street, New York. 1849.

This volume contains reports of cases decided from May 1848 to July 1848. Although the Supreme Court is not the highest tribunal in New York, the learning of those who preside in it entitles its decisions to the most respectful consideration. The volume before us displays the usual ability of the Reporter, and the same neatness in the style of the printing and binding, which characterizes the preceding volumes.

Brightly's Digest of the Laws of Pennsylvania, for 1849, was received a considerable time before the pamphlet laws for the same year. The late period at which the acts of Assembly are published is a sore evil.—Some provision ought to be made for the publication of the laws throughout the State as soon as they are enacted, and before they go into operation. We see it stated that even among the Sandwich Islanders, a nation but recently civilized, a provision is inserted in each statute of a general nature, that it "shall take effect on the day of its publication in the *Poly-nesian* newspaper." An example worthy of imitation by the Legislature of Pennsylvania.

THE
AMERICAN LAW JOURNAL.

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OCTOBER, 1849.  
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Review of *Hays v. Heidelberg*--9th Barr, 203.

[In giving publicity to the following article, from the pen of a distant correspondent, it is proper to observe that the editors of the American Law Journal are merely discharging a duty to the profession in permitting a full investigation of the decision to which it refers. We express no opinion on the views of the writer. But we give him a hearing because the question discussed is one of general importance. The writer will perceive that in the exercise of editorial discretion, we have omitted several sentences and paragraphs, which we thought not suitable to the object in view.

ED. AM. LAW JOUR.]

HAYS vs. HEIDELBERG--9TH BARR'S REP. 203.

This is a decision made by a bare majority of the Supreme Court of Pennsylvania, and announces doctrines, as we think, novel to the profession and unsustained by previous authority.

The statement of facts in the case is not very clear or satisfactory, yet sufficiently so, perhaps, to prevent any material misapprehension as to the character of the conflicting titles.

The following is the first point, and the main one decided in the cause:—"A sale by the Sheriff under a judgment, to the administrator of the defendant, who paid no money but purchased in trust for the creditors and heirs, is fraudulent as to creditors, and they may proceed by execution on judgments subsequently recovered and sell the land."

From this proposition we dissent in its abstract form; and still more in connection with the facts of this case.

It is not disputed that an administrator has an equal right with any other person to become a purchaser of the real estate of his intestate, at a Sheriff's sale. *Fisk v. Sarver*, 6 W. & S. 23. This being settled:

The second question is whether a bona fide sale by a Sheriff to the administrator, is void as to creditors under the statute of 18th Elizabeth ch. 5, in consequence of the non-payment of the purchase money to the Sheriff, and because the purchaser intended to hold the property for the benefit of the creditors and heirs?

It is assumed, as was the fact in this case, that the sale is made in the usual form. The writ is returned "property sold" and "money made." A deed is acknowledged by the Sheriff in open Court, and delivered to the purchaser. It is absolute on its face, and there is no trust of any kind—written or parol—to which the Sheriff is a party. The only trust consists in the purchasers *intention* to give the creditors and heirs the benefit of his bargain.—No fraud is charged against either the purchaser or the Sheriff.

The case before us decides that such a sale is void as to creditors, if the money have not been actually paid to the Sheriff, and merely because the purchaser intended to save the property for the creditors and heirs.

We shall contend in answer to this proposition: 1st that it is no concern of the creditors whether the purcha-

chaser pays the money to the Sheriff or not. 2d. That the purpose or intentions of the purchaser when he buys, can have no effect to convert an absolute sale by the Sheriff into a trust in the hands of the purchaser—in other words there can be no trust in such sale, unless the Sheriff himself be a party thereto; and, therefore, the Court were greatly mistaken in assuming that the Sheriff's sale in this instance was a trust at all. 3d. That no Sheriff's sale has ever been held void save for actual fraud; and the affirmative of the proposition is an absurdity in law, and a contradiction in terms.

And first, "it is no concern of the creditors whether the purchaser pays the money to the Sheriff or not?" The following, with one exception, are opinions of the Supreme Court of Pennsylvania: "If the return of the Sheriff be false, or there be any neglect of duty by the under Sheriff or bailiff, the Sheriff is alone responsible to the party injured. As between conflicting execution creditors it cannot be gainsaid; the injured party having an adequate remedy against him. The parol evidence was given to contradict the Sheriff's return, and for that purpose was clearly inadmissible." Rogers, Justice, *Mentz vs. Hamman*, 5 Whart. 154.

"The writ filed in the office became thereby a record of the office, nor could parol evidence be received to contradict it." Sergeant, Justice, in *Sample v. Coulson* 9 W. & S. 65.

"A return of money made to a venditioni exponas discharges the debt, and fixes the right of the plaintiff, and the liability of the Sheriff in the same manner as such a return to a *fi. fa.* Gibson, C. J., in *Boas vs. Updegrave*, 5 Barr 516.

"By the return and the acknowledgment of the deed the Sheriff becomes fixed for the amount of the bid."—Rogers, Justice, in *Hartman v. Stahl*, 2 Penn'a. R. 223.

In Bull's Lessee vs. Sheridine, 1 Har. & J. 'Several depositions were read by consent to prove among other things that the said purchaser did not comply with the terms of the Sheriff's sale of the said land by paying the purchase money, and that indulgence had been granted to him by the deputy Sheriff who made the sale, and by the plaintiffs in the judgments on which the fieri facias issued.'

"Chase, Ch. J. The Court are of opinion that the lessor of the plaintiff in this case acquired a legal title to the land in question, by the sale under the fieri facias, the return made by the Sheriff, and the deed made by the Sheriff to the lessor of the plaintiff, pursuant to the return made on the fieri facias, which title cannot be impeached or defeated, *but by proof of fraud or collusion between the Sheriff and the purchaser, the lessor of the plaintiff in this suit.*"

If the law be as it was decided in these cases—and we think the Supreme Court of Pennsylvania, at least, are estopped to deny it—we have established our position, that it is no concern of the creditors whether the purchaser pays the money to the Sheriff or not." If the Sheriff have returned a sale he is fixed for the amount, and the creditors cannot gainsay the payment, or inquire whether the money was actually counted down or not; that is a question belonging exclusively to the Sheriff and his vendee.

Our second proposition :—"That the purpose or *intentions* of the purchaser, when he buys, can have no effect to convert an absolute sale by the Sheriff into a trust in the hands of the purchaser,—in other words, there can be no trust in such sale unless the Sheriff be a party thereto.'

This proposition, indeed, is in one view but a corollary of the preceding one; for, if the sale is returned as absolute for money, the creditors cannot be allowed to controvert the fact.

But how could a sale be made in trust, except the Sheriff himself so conveyed? He is the party conveying, and must therefore be party to all the terms of the conveyance. It matters not whether the vendee purchases for his own use, or for others; to him the Sheriff's sale is absolute. He may have bought for the benefit of others or not; but that is a question between himself and them; and their decision either way—to accept or reject it—cannot impair the validity of the Sheriff's sale already made, and absolute in its terms between the Sheriff and the purchaser. “Whenever a party undertakes to do any act as the agent of another, if he does not possess any authority from the principal therefor, or if he exceeds the authority delegated to him, he will be personally responsible therefor to the person with whom he is dealing for, or on account of his principal.” Story's Agency sect. 264.—The principal may always elect to ratify the act if it is for his benefit, and to disavow it, if it is to his injury.” *Ib.* sect. 248.

Save only in the case before us, it has never been held by any Court that the refusal by a principal of the benefit of a purchase made on his behalf by one assuming to purchase for his use, but without authority, annulled the contract or sale between the parties. It has always been supposed that such rejection left the purchase on the hands of the agent, and the vendor was to look to him alone for the price.

Our third proposition is—“That no sheriff's sale has ever been held void save for actual fraud; and that the affirmative of the proposition is an absurdity in law and a contradiction in terms.”

In *Reigle vs. Seiger*, 2 Penn'a. Rep. 345, it was held that “the only remedy where the sale was not fraudulent, is an application to the Court to set the sale aside.” In *Bull's Lessee vs. Sheridine*, already cited, it was express-

ly held that a Sheriff's sale could not be impeached save for actual fraud.

Nor could the law be different and be consistent with itself. The Sheriff returns a sale which fixes him for the money, whether actually received or not. The return cannot be controverted. The law regards the money as in the hands of the sheriff, whether he have received it or not. That is a concern between him and his vendee exclusively. Creditors, therefore, cannot allege a want of consideration when a sale is returned. There can be no Sheriff's sale at all without a consideration. For where there is no consideration bid, the writ is returned "not sold for want of bidders." *Zantzinger vs. Pole*, 1 Dall. Rep. 419. The consideration wanting, there is no sale. A sale being returned, it must be for a consideration. A sale and a consideration are, therefore, correlative terms. A Sheriff's sale without a consideration is in law a contradiction in terms. But whether the Sheriff has made the deed without having first received the money is solely his own affair. A sheriff's sale then is always valid except where he has transcended the scope of his office, or where there is actual fraud whose presence is always fatal to any sale, public or private.

But there is one authority—and it is the only one—relied on by the Court on this point; and as it is referred to and dwelt upon with great confidence, in the opinion of the Court, we shall examine it with particular care.

It is thus cited "in the well considered case of *Piatt vs. St. Clair's heirs*, decided by the Supreme Court of Ohio, (6 Ohio Rep. 93,) the facts were singularly like those in our case. There the estate of St. Clair being deeply indebted, was exposed to sale for the non-payment of taxes, and purchased at a nominal price by one of the heirs for himself and the co-heirs. Afterwards, upon an order of the proper Court, the administrator of the deceased again

exposed the estate at public sale, and struck it off to the same heir, who however, neither paid nor gave security for the payment of the purchase money. This sale was returned to and confirmed by the Court. Subsequently the administrator and purchasing heir joined in a conveyance to a third person in trust to pay the purchase money, and liquidate such claim against the estate of St. Clair, as the parties to the deed might see fit and expedient. *But these sales and conveyances were declared void against the creditors of St. Clair*, and they were permitted to come in on the estate, though as was observed by the Judge who pronounced that judgment, there was no doubt *that these arrangements* were made by the administrator and the other persons concerned, with an intention to place the real estate of the intestate in a situation to be managed for the benefit of the heirs, and to use it advantageously for them, to discharge the demands against the estate without any design of injury to the creditors, or any distinct impression that injury would result to them. As has already been intimated, the same remarks may with justice be applied to the action of the administrator and his co-adjutors in this instance; but this does not relieve it of the illegal taint which infected it from the beginning."

Since *Piatt vs. St. Clair* is the only authority which the Court have ventured to cite in reference to this question, it is the more important to shew the very facts of that case. It will then be seen on which side that decision must be properly ranged.

Observe : The question is whether a sheriff's sale made in good faith and absolute on its face, is rendered void under the statute of Elizabeth, because the purchasing administrator *intended* his purchase to be for the benefit of the creditors and heirs, and paid no money to the sheriff at the sale.

The learned Judge states in substance *that St. Clair's estate* was sold :—1st. For taxes at public sale, and bought in by one of the heirs. 2d. Sold again by the administrator under an order of the proper Court, and again purchased by the same heir. 3d. Transferred and conveyed under a joint deed of voluntary assignment from the administrator and purchasing heir, to a third person in trust to pay the purchase money due from the heir, on account of his previous purchase from the administrator, and such claims against the estate of St. Clair as the parties to the deed might deem fit and expedient.

He states that all "*these sales and conveyances*," and "*these arrangements*," were held in that case to be void as against the creditors of St. Clair, although made in good faith, and without any purpose to injure the creditors.

FIRST—THE TAX SALE.

In regard to this sale the Supreme Court of Ohio in this case state expressly that all the taxes due prior to the death of the intestate, were paid by the administrator long before the sale ; and that the sale was for the taxes which had been assessed and become due after the estate had descended to the heir, and which were not therefore a debt payable by the estate of intestate at all, but by the heirs themselves. The Supreme Court of Ohio says :—*"They"* (the heirs) *"were bound of course to pay the taxes. It would be strange, indeed, if either a Court of Law or Equity should feel compelled to give such effect to the culpable omission of the heir to keep down the taxes as to enable him in consequence to acquire a perfect right to the estate, to the total exclusion of those whose rights he was bound to protect. We look upon the purchase of the heir, for taxes, as but his own method of paying them."*

This exhibits a very different aspect of the case from that set forth in the opinion under review. The only

question in fact was whether the creditors of the estate should be defeated by a tax sale made to the heirs, on account of the non-payment of their own taxes.

SECOND—THE SALE BY THE ADMINISTRATOR.

This sale was never carried out, or completed by the delivery of a deed, and besides, there were strong and manifest badges of fraud in regard to it, between the heir and the administrator. The terms of sale, which in such cases are always prescribed by the Court, were that the purchase money should be payable by instalments running through a period of two years, and to be adequately secured. The administrator returned that he had made a sale, but did not state to whom. The Court notwithstanding confirmed the sale. The sale was now complete, except that no deed was made to the purchaser; and he had given no security for the payment of the purchase money. Probably the deed was not made because the administrator chose to retain the title as the best security for the payment of the purchase money. Be that as it may, the purchaser neither paid the money, gave security for its payment, or ever got his deed. The sale therefore failed, and it is expressly stated that it was regarded by the parties as having fallen through; and the title to the property still remained as the estate of the intestate.

But more than this, the case of *Piatt vs. St. Clair's* heirs came before the same Court at a subsequent term, (see 7 Ohio Rep., part 2nd, 168,) when the Court spoke of this administrator's sale in the following language: "It will be observed that in this case the petition, the appraisal, and the order of sale, being the ceremonies instituted by law for the protection of the heirs were regularly complied with, and conferred the power to sell. *If the purchase of the younger St. Clair had been unattended with collusion*, the estate of the heirs in these lands would have rightfully passed to him at their price." This sale was

void therefore, for actual fraud as well as for the failure of the purchaser to comply with its conditions and obtain his deed.

THIRD—THE ASSIGNMENT TO JOSEPH S. BENHAM.

This was a joint conveyance of the land by the purchasing heir and the administrator to Benham, "*in trust to pay the purchase money and of liquidating such claims against the estate of Arthur St. Clair, as the parties to the deed might see fit and expedient.*"

It has been shown that the heir acquired no title under either of the former sales. It need hardly be observed, that the administrator had no right in the land, or power to convey it to Benham. If there had been nothing unlawful, therefore, in the terms of the deed itself, this conveyance must have been void for want of title in the assigners. But it was void also on another ground. It left it in the power of the parties thereto to pay only "such claims against the estate of Arthur St. Clair, as the parties to the deed might see fit and expedient."

Here was a power retained which was altogether incompatible with the creation of an honest trust.

It was, besides, a mere private transaction between the parties, not a sale by the sheriff absolute on its face and bona fide.

No argumentation was needed to prove that this was a void assignment. In the first place, the two previous sales being void, neither the heir or administrator, or both united, had any power to convey the property discharged of the ancestor's debts. And in the next place, if they had the power to create a trust, this one was void; for it only provided for the payment of such debts as the parties to the deed might see proper to pay; and they might have considered it most expedient to treat all alike, and pay none.

This, however, was the only one of the then sales in

which the Supreme Court of Ohio admitted that there might have been good faith. And even this was a concession made rather out of abundant charity, than sustained by the nature of the transaction. The language of the Court is : "There can be little doubt *but the arrangement with Benham* was made with the assent of Lytle, the administrator, and the other parties concerned, with the intention to place the real estate of the intestate in a situation to be managed for the benefit of the heirs, and to use it advantageously for them to discharge the demands against the estate, &c. In this no fraud was intended by the administrator, and the others concerned."

But to have restrained the application of this language to this simple transaction with Benham, would hardly have made out *Piatt vs. St. Clair*, a case "singularly like our case," or an authority in point to avoid the sheriff's sale in question.

We have quoted the language of the Ohio Court as it is. We shall now quote that which is attributed to that Court in the opinion under review. "But *these sales and conveyances*," (including both the tax sale and the administrator's sale to the heir—this last pronounced to be void for *actual* fraud)—"were declared void against the creditors of St. Clair, and they were permitted to come in on the estate, though as was observed by the Judge who pronounced that judgment, there was no doubt that *these arrangements* were made by the administrator and other persons concerned, with an intention to place the estate of the intestate in a situation to be managed for the benefit of the heirs, and to use it advantageously for them, to discharge the demands against the estate without any design of injury to the creditors, or any distinct impression that injury would result to them."

So far we have argued this question as though the Court were right in saying that no money was paid by the purchaser in this case.

But the sheriff made his return that he had sold the property to William Wilkins for \$2,300, and that after deducting the costs, he had returned the balance, \$2,224 37 cents, to William Wilkins, one of the administrators of Steel Semple, deceased.

It is indeed certain the money was not actually handled by the parties at the time of the sale. But that was not necessary; for in *Grier vs. Kelly*, 2 Binn. 288, and *Commonwealth vs. Rahn* 2 S. & R. 375, it was held that it was proper for the sheriff to pay over the proceeds arising from a sale of intestate's land, to the administrator, for distribution amongst the creditors. That such a course was proper in the present instance is evident from the fact that the plaintiff, in the execution under which the land was sold, was not entitled to receive one cent of the proceeds, his judgment having been obtained subsequently to the death of intestate, and for that reason ranking but as a simple contract debt of the estate.

At all events the payment of the money to the administrator is to be regarded as having been directed by the Court; for, with a knowledge of all the facts, the Court ordered the sheriff to make the deed to Wilkins, thus ratifying this disposition of the fund.

But because the gold and silver were not first counted out to the sheriff by Wilkins, and then counted back to Wilkins as administrator, by the sheriff, the Court in the case before us, decided that the sale was without consideration, no money having been paid. That were a ceremony no doubt considered useless by the parties, and if employed, had been an effort of financial skill hardly to have been expected of them at that day; and for want of which they could not have foreseen that the Supreme Court of their State would pronounce the sale to have been null and void, thirty years afterwards.

The purchase money of this sale must therefore be re-

garded as actually paid by the purchaser, and by the sheriff placed in the hands of the administrator for distribution.

The learned Judge, then, has fallen into a material misapprehension in this respect, when he says that "it was part of the plaintiff's care that no money was paid" by the purchaser.

It was part of the plaintiff's case—if that circumstance could be of any consequence to a Court in deciding on this title—that no gold and silver were actually *manipulated* by the parties at the time. *Frustra petis quod statim alteri reddere cogeris.*

But in contemplation of law the money was paid, and it was part of the plaintiff's case that it was paid in this sense. It is not alleged that the administrator has ever been discharged from that office. He, therefore, held and still holds the money for distribution; and the creditors were bound to look to him for it at their peril.

"Lien creditors are to look to the application of the fund at their peril; every thing which a due attention to their interests would have entitled them to receive being considered as paid by operation of law as regards the debtor." *Bank of Pennsylvania vs. Winger*, Rawle R. 295. Same doctrine in *Finney's adm'r. vs. Common'th.*, 1 Penn'a. R. 240.

Can it be denied that the administrator was liable for this money to the creditors? If not, there is an end of the controversy. The land was discharged of the debts; and the creditors at their peril were bound to look to the application of the money.

The creditors, therefore, were in this dilemma. If they refused to accept the benefit of the trust offered them by Wilkins, the sale was thrown upon his own hands; he was liable to them as administrator for the purchase money; the land was beyond their pursuit; and they were bound

at their peril to look to the administrator for a distribution of the fund.

If they, on the contrary, ratified the trust on their behalf, that was a private transaction between Wilkins and themselves, having no effect upon the sheriff's sale already consummated and valid; the title was in Wilkins for the purposes and objects of the trust thus established between the administrator and themselves, and the land could not be followed in his hands by an execution against the estate. *Agnew vs. Fetterman*, 4 Barr 63. Act of Assembly 24th March, 1818, 7 Smith's L. 131, and Supplement 29th March, 1823, 8 ib. 94. W.

Supreme Court of New York.

THE PEOPLE, *ex. rel.* ALETTA BUKMAN *vs.* THE SARATOGA AND SCHENECTADY RAILROAD COMPANY.

1. A mandamus directed to subordinate *judicial* tribunals may require them to proceed to judgment, but may not dictate what judgment they shall render; but a mandamus to *ministerial officers* and to *corporations* does not merely require them to act but directs the specific act which they are required to perform.

2. It is no answer to the application for a mandamus that the relator has a remedy in *equity*, or that an *indictment* will lie for the same injury.

3. The existence of another remedy for the same injury, inflicted by a corporation, is no bar to a mandamus unless such remedy be a *legal, appropriate, and specific* remedy.

4. Where a rail road company is bound to erect and maintain sufficient fences upon the line of their railway, and, after erecting such fences, suffers them to decay and to become insufficient, and has refused, upon request, to rebuild or repair them, a mandamus lies to compel the performance of this duty.

On a former day a motion was made, before Mr. Jus-

tice WILLARD, at his Chambers, in pursuance of section 360 of the Code of Procedure, for an alternative mandamus to the defendants requiring them to erect and maintain sufficient fences upon the line of the said rail road where it passes through the farm of the said Aletta, or shew cause to the contrary before the Supreme Court, &c., &c. The motion was made *ex parte*, and the Judge granted the writ, which was afterwards duly served on the defendants. A motion was then made to quash the writ, and on the argument of this motion, the respective counsel treated the cause in the same way as if the application were on the part of the relator for the allowance of the writ upon notice to the defendants. From the affidavit on the part of the relator it appeared that the defendants were incorporated by the act of Feb. 16, 1831, (L. of 1831, p. 41,) with power to construct a single or double rail road between the village of Saratoga Springs and the city of Schenectady. By the 10th section of the act of incorporation it was thus enacted:—"Wherever it shall be necessary for the construction of their single or double rail road or way to intersect or cross any stream of water, or water courses, or any road or highway lying between [the termini of the said road] it shall be lawful for the said corporation to construct their single or double rail road or way across or upon the same, provided that the corporation shall restore the stream or water course, or road, or high way thus intersected, to its former state, or in a sufficient manner not to have impaired its usefulness; and shall moreover erect and maintain sufficient fences upon the line of the route of their single or double rail road or way."

That the company shortly after the passage of the act, were duly organized, and subsequently constructed the rail road contemplated by the charter.

At the time of the passage of the said act, John K.

Bukman was the owner in fee of a farm adjoining the village of Saratoga Springs, through which, for the distance of about one hundred rods, the said rail road is constructed, the title to which was acquired by the defendants, in virtue of proceedings under the said act and not by grant from the said John. That the said John is now dead, and the title to the said farm is vested in the relator by devise—that the defendants heretofore constructed a fence on both sides the said road where it passes through the said farm, but have suffered it to go to decay, and to become entirely insufficient; and though requested, have neglected and refused to rebuild or repair it. The affidavits disclose the time and manner of the request to rebuild or repair the fences, and the absolute refusal of the defendants.

The question presented for the consideration of the Court was, whether the foregoing facts afford a *prima facie* case for a mandamus to the defendants to compel them to rebuild or repair it.

Wm. L. F. Warren, for the motion.

Wm. A. Marsh, contra.

WILLARD, J. There is a plain distinction between the office of a mandamus, directed to *inferior tribunals*, and that which is awarded against *ministerial officers and corporations*. In the first case, this Court, in the exercise of its judiciary powers, can require the subordinate tribunals, by mandamus, to proceed to judgment, but cannot dictate what judgment they shall render; much less can it require them to retrace their steps, and reverse a decision already made. There are a few cases in which this Court departed from this principle. (*The People vs. Superior Court of N. Y.*, 5 Wend. 114, 10 ib. 285 S. C; but the true doctrine was restored by the decision of the Court of Errors in *The Judge of Oneida vs. The People*, 18 Wend. 79, which has been ever since followed. The Peo-

ple vs. Judges of Dutchess 20 Wend. 658, and same vs. Judges of Oneida 21 Wend. 20. All the earlier cases on this subject are reviewed in the foregoing, and it would be a waste of time to re-examine them. It is now well settled here, as well as in England, and in the Courts of our sister States, that the office of a mandamus when directed to inferior judicial tribunals is merely to require them to exercise their functions and render some judgment in cases before them, but not to direct what judgment shall be pronounced.

In respect to the second class of cases, when it becomes important to control the action of *ministerial officers and corporations*, the writ does not merely require them to act, but directs the *specific act* which they are required to perform. And it may be issued in some cases, according to Blackstone, (3 Com. 110,) "when the injured party has also another more tedious method of redress as in case of admission or restitution to an office; but it issues in all cases where the party hath a right to have any thing done, and hath no other *specific* means of compelling its performance." The party asking for a mandamus, says Savage, Ch. J. in *The People vs. Supervisors of Columbia*, 10 Wend. 366, must have a clear legal right and no other appropriate specific remedy. And per Nelson J., in *The people vs. Mayor of N. York*, 10 Wend. 397, it is no answer to the application for a mandamus, that the relator has a remedy in equity, or that an indictment will lie for the same injury. And per Bronson, Ch. J., in *McCullough vs. Mayor, &c., of Brooklyn*, 23 Wend. 461, though a corporation be liable to an action on the *case* for a neglect of duty, they may be compelled by mandamus to exercise their functions according to law. The existence, therefore, of another remedy for the same injury inflicted by a corporation, is no bar to a mandamus, unless such rem-

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edy be a *legal, appropriate and specific* remedy, 3 T. R. 651, 1 Barbour's S. C. Rep. 84, Trustees of Williamsburg, per Edmonds, J. The People vs. Stark, 2 Barb. S. C. R. 418, per Edmonds, J. Shelford's Law of Railways 447, et seq. and cases cited.

I am aware that in *ex parte* The Fireman's Insurance Co., 6 Hill 242, which was an application for a mandamus requiring the Commercial Bank of Albany to transfer thirty shares of the capital stock to the relators, the motion was refused (Bronson J. giving the opinion) upon the ground that the party injured had an *ample though not a specific* remedy by action; for which Kortwright vs. Buffalo Commercial Bank, 20 Wend. 91, 22 ib. 348 S. C., in Error, and The King vs. Bank of England, Douglass 524 were cited. But those cases do not establish that position. The two former, indeed, shew that assumpsit will lie for such refusal, in which the measure of damages is the full value of the stock. This was deemed by Lord Mansfield in the latter, and by Ch. J. Nelson in the former case, *equivalent to the specific remedy by mandamus*.—Lord Mansfield expressly holds, that where there is no *specific remedy*, the Court will grant a mandamus that justice may be done. But when, as in the case before him, an action would lie for *complete satisfaction, equivalent to a specific relief, and the right of the party applying is not clear*, the Court will not interpose the extraordinary remedy of mandamus. Those cases do not conflict with, but support the principle already stated. If the relator has a clear legal right to have the thing done, and there is no other *specific relief*, a mandamus is the proper remedy.

There is no hardship in requiring those who obtain an act of incorporation for executing great public works, to fulfil all the duties which the act enjoins. The performance of those duties constitutes a part of the consideration of the grant of corporate privileges, and it may be enforced

by this Court by mandamus. The English Courts have, in a great variety of instances, applied this remedy in analagous cases. Thus, in *Regina vs. Bristol Dock. co. Ad. & El. N. S. 64*, a mandamus was issued to the defendants, requiring them to repair and maintain the banks of a river, which they had been permitted to change, the act of incorporation requiring them "to make, complete and maintain" the new channel. It was objected on the part of the company, that they were only liable to an indictment, or to a civil action at the suit of the party injured; but the Court ruled that if the breach of the contract created by the acceptance of their charter, caused a public nuisance, it could not dispense with the necessity of a *specific performance* of the obligation contracted by the company—and see *Regina vs. Bristol and Exeter Railway Co.*, 3 Railway cases 433. Same vs. Manchester and Leeds Railway, 3 Ad. and El. N. S. 528. Same vs. Bristol and Exeter Railway Co., 4 Ad. and El. N. S. 162, Rex. vs. Severn and Wye Railway Co., 2 B. and Ald. 646.

In *Regina vs. York and Midland Railway Co.*, 14 Law J., N. S. 2 B. 277, the question arose under an act "requiring the company to make proper watering places for cattle in all cases where by means of the railway the cattle of persons occupying lands adjoining thereto should be deprived of access to their ancient watering places, and to supply the same with water," the company were required by mandamus, granted on the relation of the party prejudiced by their refusal, to make watering places as prescribed in their act of incorporation. Walford's law of Railways, 389. In this case an action doubtless lay against the company, founded on their legal obligation to make the proper watering places. But the remedy by action would not have reached the mischief, and was greatly inadequate as a means of redress. It formed, therefore, no objection to the *specific* remedy by mandamus.

From the foregoing cases it will be seen that whether the act or neglect of the corporation occasions damages to the public, or to an individual, the remedy by mandamus is in general appropriate. It is spoken of in some of the cases as a specific remedy, like a bill for a specific performance. 2 Railway cases 710. *The Queen vs. The Birmingham and Gloucester Railway Company.*

The general consolidation act of 1845, (8 and 9 Victoria C. 20,) requires the railway companies to make and maintain, for the accommodation of the owners and occupiers of lands adjoining the railway, necessary gates, bridges, arches, *fences*, ditches, mounds, tunnels, &c., &c., particularly described in the 68th section. The requirement as to fences is not more stringent than that contained in the act of 1831 incorporating the defendants. "The good fencing of railroads is essential to the safety of passengers; and it must be observed that the bank on which a railroad is formed especially attracts the cattle by reason of its dryness, compared with the adjoining fields; while one small defect in the fence may endanger the lives of the whole train of passengers. It is, indeed, doubtful whether a thorn hedge can be considered a sufficiently secure protection for the line of railway; but it is certain, that the power of obliging a railway to make good its fences should not be left to the proprietors or occupiers of the adjoining lands, who may not be constantly vigilant, or who may not choose to interfere." 2 Rep. on Railways, 1839, (115) p. 11. Shelford L. of Railways 389. This report shews the strong sense which is entertained in Great Britain, of the necessity of preserving a suitable fence on the line of railroads and is a vindication of the policy of invoking the aid of this Court to enforce a compliance with this part of the defendant's charter. It is to be inferred from the disposition of the case of *The Queen vs. The Birmingham and Gloucester Railway Company*, 2

Railway cases 710, that a mandamus would lie in a proper case to compel the company to build or repair fences on the line of their road. The Court certainly would not otherwise have imposed upon the company, the repair of fences on each side the road, as a condition for opening a rule for a mandamus.

It can not be necessary, on this occasion, to advert to the instances in which the Court should refuse a mandamus. It will not be granted to enforce the general law of the land, if an action will lie, although in some cases it will be granted where an indictment may be preferred.—Shelford on Railway cases 458. It will be time enough when the return comes in, to review the whole doctrine with its qualifications and limitations.

It is probable that the relator has a remedy under the Code of Procedure, in the nature of a bill for specific performance. But by the 390th section of the Code the proceedings upon mandamus, among others, are left unaffected by that act.

The result is that there is probable cause shewn for an alternative mandamus, and consequently the motion to quash it, must be denied. See general railroad law of 1848, L. 236, § 42, requiring all railroads, &c., to erect and maintain fences, &c.

NORX.—The defendants appealed from this decision to the General Term of the Supreme Court; and at the recent sessions of the General Term for the 4th District, before Justices Paige, Willard and Hand, the above decision was unanimously confirmed. This last decision was pronounced at Canton, St. Lawrence co., Sept. 6, 1849.

New York Superior Court.

Before Oakley, Ch. J., and Vanderpool, and Sandford, J. J.—March Term, 1849.

[Reported for the American Law Journal.]

CASHMERE vs. CRONELL AND DE WOLF.

The Courts of common law in the respective States, have jurisdiction to determine questions of *salvage*, arising in suits which in other respects fall within the cognizance of such Courts.

The jurisdiction of the Admiralty Court of the United States over questions of salvage, is concurrent with that of the State Courts, and not exclusive.

Held, accordingly, that a State Court having law and equity powers, was bound to entertain a suit brought to redeem goods which were claimed under a lien for salvage services, (there being no suit pending in the Admiralty Court,) and that it could restrain the removal of the goods, appoint a receiver to ascertain the extent of the lien, and to whom it was due, and decree its payment.

This cause was argued before the full bench, on a motion for a receiver. On a previous motion to dissolve the injunction, the argument by consent, was limited to a point not now raised. The great question involved, was the jurisdiction of a State Court, to entertain a cause involving a question of salvage. With the facts appearing in the opinion of the court, the following will suffice to present the case intelligibly.

The plaintiff, a merchant in Bombay, in Hindostan, shipped to a merchant in London, by a British vessel, the *Lady Kennanay*, a large invoice of Cashmere shawls. In November, 1847, the vessel when near the English coast, was abandoned by her master and crew, and while in that state was boarded by the defendant Cronell, the master of another British vessel, together with his crew, who took from the *Kennanay* a large quantity of goods, including

the plaintiffs' shawls, and in continuation of their voyage, brought the goods to the port of New York.

After their arrival here, Cronell libelled the goods for salvage in the District Court of the United States for the Southern District of New York, and the same were deposited with the Collector of the port, but in the Marshal's custody, pending the libel. The British Consul intervened in the suit in behalf of the owners of the goods, and insisted that the whole matter should be remitted to England for determination there. In July, 1848, the District Court dismissed the libel, refusing to take cognizance of the case, and directing the Marshal to restore the goods to Cronell. Thereupon Cronell's agent, the defendant De Wolf, was proceeding to obtain the goods from the Collector, when the plaintiff filed his complaint, seeking to enjoin the parties from obtaining possession of his goods, and claiming to have them restored to him, on payment of whatever was justly due to Cronell and his associates, if they were entitled to any compensation for the salvage claimed.

D. Lord, for the plaintiff.

J. W. Gerard, for the defendant De Wolf.

SANDFORD, J., delivered the opinion of the Court, as follows:

The defendant contends that this Court has no jurisdiction, because the lien claimed by Cronell and his associates, is for salvage of a cargo, derelict at sea; and the jurisdiction is exclusively in the Court of Admiralty. It is not denied that in England the Courts of common law have concurrent jurisdiction with the Admiralty Courts, in determining questions of salvage; but it is claimed to be otherwise here, by force of the constitution of the United States and the Judiciary Act of 1789.

In determining this point, the relative convenience of the respective tribunals is not important. Jurisdiction depends on other and higher considerations.

Section nine of the Judiciary Act of Congress, which declares the authority of the District Courts of the United States, clothes them with "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of imposts," &c., "saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it."

It is difficult to perceive why, under this important exception, when we had in this State in full operation the same common law that governed in England, and like courts of law and equity, administering the same remedies and in the same forms of proceeding, which were administered and used by the courts of law and equity there; the courts of this State did not retain precisely the same jurisdiction which the courts of common law in England exercised, concurrently with the Admiralty Court, prior to the American Revolution. We are, however, referred to the recent decision of the Supreme Court in this district, in *Frith vs. Cronell*, reversing an order of one of the Justices of that court appointing a receiver of goods taken by the same parties, at the same time and under the same circumstances, with those in question here. That court refused to entertain jurisdiction for the reasons that it is not a proper tribunal to try a question of salvage, its forms of proceedings are inadequately adapted to it; it has never exercised such a jurisdiction, and the Court of Admiralty is the proper tribunal for that purpose.

This decision is not placed distinctly on the ground urged at the bar, that the Admiralty Court has exclusive cognizance of the matter; but rather on the novelty of the appeal to the Supreme Court, and its inadequate machinery to deal advantageously with such a case.

After carefully considering the question, we are constrained to differ from that learned tribunal; which we never can do without regret. And this unfortunate disa-

greement impels us to give our views more at large than we are wont on interlocutory applications.

The constitution of the United States does not determine the point. It authorizes Congress to create inferior courts and confer on them admiralty jurisdiction. Until Congress exercised the authority, there was no interference with the State courts; and when the U. S. District Courts were created, and their cognizance defined, their jurisdiction became exclusive only so far as it was made exclusive by the act of Congress. In all other cases where the courts of common law provided an adequate remedy before, it seems to be plain that the judiciary act, at most, gave only a concurrent jurisdiction to the admiralty.

The great argument against the jurisdiction of this court, to decide a question of salvage, was founded upon the decisions respecting prize causes. As to this argument, the common law courts in England never had any jurisdiction of questions of prize of war. This was most elaborately adjudged in the great case of *Le Caux vs. Eden*, Dougl. 594, and it was there shown to have been the settled law for more than a century. Of course, there could be no pretence that our State Courts had a maritime jurisdiction, which the English common law courts had not; and it has never been claimed. In the case of *Hallett vs. Novion*, 14 Johns. 273, (reversed in 16 *ibid.* 327,) the Supreme Court maintained the suit, as establishing merely a marine tort, against the opinions of Spencer and Yates, justices, that it was a case of prize; and the court of last resort, reversed the judgment on the sole ground, that the captors claimed to have seized the vessel as prize of war, which involved a question not determinable in a court of common law.

The jurisdiction in cases of prize rests upon the law of nations, and is peculiar in England, as well as in the United States. In England, the Admiralty Court, acting upon

these questions, is called a *prize court*; when acting upon all others it is an *instance court*. It not only has different names, but the two courts differed essentially, because the appeal was to a different tribunal in the instance court, from that provided in the prize court. In the latter, the questions arising were political; in the former they were the ordinary questions of municipal and commercial law.

Moreover, the prize court only exists in England, by force of a commission issued on the breaking out of hostilities, and a new commission is requisite to provide for each new war. The judge of the instance court of Admiralty, it is true, is uniformly clothed with the prize jurisdiction under such commissions; but there is no legal obstacle to its being conferred on another and distinct judge. (See *Lindo vs. Rodney*, Dougl. 623, note 1.)

This being the constitution of the prize court of admiralty in England, it was stoutly denied, in the origin of our constitutional government, that the act Congress creating the district courts conferred any jurisdiction upon them in cases of prize. It was not till after conflicting decisions on the point, in two district and two circuit courts, that it was finally decided by the Supreme Court of the United States, that the district courts possessed the powers of a prize court of admiralty. (*Glass vs. The Schooner Betsey*, 3 Dallas 6; and see 3 *ibid.* 54.)

Thus it will be seen that on the only subject which in England was beyond and exclusive of the jurisdiction of the ordinary courts of law and equity, it was not till after serious doubt and contestations that our courts of admiralty were held to possess jurisdiction by a decision of the national court of last resort.

There was subsequently a struggle relative to the instance powers of the district courts of admiralty, touching seizures for forfeitures provided by acts of Congress, in law, other than those regulating trade, imposts and navigation; but the jurisdiction was fully maintained.

Next came the effort to bring all marine contracts within the admiralty powers of the district courts. To the extent which the English Admiralty took cognizance of such contracts, there was no difficulty ; but the attempt to exercise in our courts of admiralty, the large powers which were claimed for that tribunal several centuries ago, and which were so zealously and successfully resisted by the common law judges in England, was inflexibly opposed in the Supreme Court of the United States.

The same is true of the subsequent claim of jurisdiction in the district courts, in cases of marine torts occurring on our inland waters, and within the limits of counties.

Mr. Justice Story contended for the enlarged jurisdiction for enforcing marine contracts, in *De Lovio vs. Boit*, 2 Gall. 398, and *Peele vs. The Merchant's Insurance Co.*, 8 Mason 27, while the opposite view was maintained with equal zeal by Mr. Justice Johnson, in *Ramsay vs. Allegre*, 12 Wheat. 614.

In *Bains vs. the Schooner James and Catharine*, 1 Balw. C. C. R. 544, Judge Baldwin delivered an able judgment against the existence of jurisdiction in the district courts, to enforce contracts regulated by the common law, though made concerning maritime subjects.

The discussion was renewed in the *Merchants' Bank vs. The N. J. Steam Navigation Company*, (6 Howard's R. 344,) no longer ago than last year ; when Mr. Justice Daniel contended against the jurisdiction, in a powerful and elaborate opinion ; and it may be considered an open question at this moment, whether our courts of admiralty have, as a concurrent jurisdiction, cognizance of any class of marine contracts, which were not at the revolution within the jurisdiction of the English admiralty.

In *Waring vs. Clarke*, 5 Howard 441, a majority of the Supreme Court of the United States decided that the district court in admiralty could entertain a libel as for a ma-

rine tort, for damages sustained by the collision of two steamboats on the Mississippi river. Judge Wayne delivered the prevailing opinion, which was met by a full and very able dissenting opinion from Judge Woodbury, in which two of his associates concurred. The great point of the argument in the majority opinion, was to show that the district court had concurrent jurisdiction of the tort, with the courts of common law.

In *The American Insurance Company vs. Canter*, 1 Peters 511, 546, to which we were cited by the defendants counsel, Chief Justice Marshall says, the exercise of admiralty jurisdiction in the States can only be in those courts which are established in pursuance of the third article of the constitution of the United States. This observation of the learned judge, has no application to the point before us, because he was not speaking of common law courts at all; and he was arguing to show, that the legislature of a Territory might establish a salvage court, for the reason that such legislature combined the governmental powers of both the State and the general Governments; it being contended that the power conferred on Congress by the constitution to establish admiralty courts in the States, did not extend to the territories of the United States.

We were also referred to *Brevooor vs. The Ship Fair American*, 1 Peter's Admiralty Rep. 81, and to a note founded on that case, in Story's *Abbott on shipping*, 557. The case itself was a libel for salvage, and amongst other objections to the jurisdiction of the court, it was shown that the ship had been delivered to the owners, the salvage could no longer proceed *in rem.*, and the lien was gone. Judge Peters upheld his jurisdiction and decided that admiralty could proceed *in personam* for salvage;—also, that the lien was not gone. He said further, that no case is produced in a common law court of a suit for

salvage on the high seas ; and the reason for there being no such jurisdiction is that the common law courts cannot proceed *in rem*. This, it will be observed, is not a decision : and the reason assigned, while it is inapplicable to courts of equity, does not apply to cases in the courts of law where salvage comes in question incidentally.

We have thus briefly reviewed the history of maritime jurisdiction under our national constitution, to show that it is essentially without change from the English system. The admiralty court is held to have the same powers as an instance and a prize court, that the same tribunal possesses there, exclusive as a prize court, and concurrent in its other jurisdiction, in all cases where the common law courts gave a competent remedy and the admiralty was not made exclusive by law. The great struggle in the United States courts has been to extend admiralty jurisdiction to cases which in England were exclusively confined to the courts of law and equity ; not to exclude from the concurrent jurisdiction here, any cases that were concurrent there.

We can find no reason for excluding questions of salvage from this concurrent authority, if parties choose to call for its exercise, and the cases are in other respects within the scope of our established jurisdiction. The authority in the English courts of common law was conceded and many cases are reported where it was applied both at law and in equity. In this country we find one case, that of *Blake vs. Patten*, 15 Maine Rep. 173, where an action was maintained by a sailor against the master of a vessel for his share of a salvage received by the latter. And see *Abbott on shipp.* by Story and Perkins, [556] 662. The principle of *Percival vs. Hickey*, 18 Johns. 291, is decisive, although that was a marine tort and not a salvage. A military salvage arising upon a re-capture, is a case of prize, (*The Schooner Adeline*, 9 Cranch 244,) and does not affect the question.

Our conclusion on the case as made by the compliant, was declared on a former occasion. (Cashmere vs. Cronell, 1 Sand. R. 715.) It exhibits a tort committed at sea on the plaintiff's goods, commencing with an alleged salvage. The defence is a claim for salvage of the goods; not denying that they are the property of the plaintiff or of some stranger, but claiming a lien for salvage services. The Supreme Court in Frith vs. Cronell, admit the general jurisdiction of a court of equity to interfere to ascertain the extent of a lien, in aid of a party who must pay it before he can obtain possession of his property; and we suppose it is unquestionable.

This is a court of equity and the plaintiff seeks to redeem his goods. But it is said the lien is a salvage claim, and this court has not the machinery properly to dispose of such a claim. Why not? The court of chancery, to which all our forms of procedure are now assimilated, has ever used the same civil law forms which distinguish admiralty proceedings; and in a vast number of cases, growing out of corporations, joint stock companies, whaling adventures, the administration of estates, and the like, have entertained suits far more complicated and involved, and requiring more parties than any salvage case to be found in the books. The libel in admiralty is the bill in chancery. Both courts proceed *in rem*, and both make decrees affecting numerous parties who do not appear, and who have no actual notice of the proceedings.

Assuredly we feel no disposition to invite into this court, cases involving questions of salvage; but we cannot say with truth that the court is inadequate to investigate them. In this suit, if the plaintiff's motion be entertained, the course will be to place the property in the hands of a receiver, and being perishable, he will be directed to sell it at once. The proceeds will remain in court until the claims can be determined. If there are

not sufficient parties, the defect will be supplied ; and on a reference, either with further parties, or by a notice to all persons interested, such as is given in partition cases and administration suits, the referee will proceed to investigate the claims of all persons entitled to share in the salvage.

The propriety of our entertaining jurisdiction, is also questioned ; and the declension of the District Court to take cognizance, is cited as adjudging its impropriety.

The decree of that court gives the reason of its course, which was that the property was taken by the salvage claimants on the British coasts within soundings; all the parties concerned were British subjects, and both ships were British vessels. The British Consul, interposing for unknown owners, made the objection to the courts taking cognizance of the matter ; and the court holding that it could exercise a discretion, declined to proceed.

The facts which influenced the U. S. District Court, do not confer any discretion upon us. The case before this court shows sufficiently to require its action, that the property which is now here, if actually *salved*, was wrongfully brought here ; and that parties who are foreigners and irresponsible, are seeking to carry it away without any security to the owner that it will be taken to Great Britain, or to any country where he will ever hear of it again. He is willing to pay such salvage as the claimants ought to have ; and he desires to have his property protected till their claim can be ascertained.

If there were a suit pending in the admiralty court, we might and should decline jurisdiction ; but we have no right to refuse it when required to act in a case within our proper cognizance, which is not in litigation elsewhere.

If we err in our view of the jurisdiction of the common law courts to decide upon salvage questions, we ought nevertheless to interfere for the protection of the plaintiffs

property, until the question can be properly settled; but we entertain no doubt on the principal point.

As to the objection that the plaintiff brought upon himself the necessity for the salvor's removal of the goods by opposing the proceeding in the District Court, we find no sufficient evidence that he was an actor at all in that court. The British Consul interposed to protect the property belonging to subjects of his government, as he had a right to do; but he could not, as Consul, receive restitution, or even obtain a decree to that effect. (*The Bello Corrunes*, 6 Wheat. 152; *The Antelope*, 10 *ibid.* 66.)

This is not an action in the nature of the former action of replevin. It is more in the nature of a bill for redemption of chattels retained for a lien.

There must be a receiver appointed, with the usual authority.

Cumberland Circuit Court, New Jersey.

AUGUST TERM, 1848.

[Reported for the American Law Journal.]

SHEPPARD vs. GANDY, IN ASSUMPSIT. DEMURRER TO DECLARATION.

One Curtis Blew, and another, gave their bond to the defendant, dated 8th December 1841, conditioned to pay him or his assigns \$300 in six months from date, with interest. The defendant, 27th Dec. 1841, assigned the bond to one Harmer by a written assignment endorsed on the bond in the following words, viz: "I assign all my right and title to the within bond, and guarantee the payment till paid." On the 1st Feb. 1842, Harmer in the same manner assigned the bond to the plaintiff, and guaranteed the payment. The declaration set out that each assignment and guarantee was in consideration of the full amount of the principal and interest due on the bond, paid by Harmer and the plaintiff respectively upon the successive transfers of the bond.

L. Q. C. Elmer, for demurrant.

Nixon, contra.

CARPENTER, J. The question in this case is whether

the guarantee made by the defendant to Harmer is a negotiable contract and can be sued upon by the second assignee.

It is a well settled principle of the common law that choses in action are not assignable, so that an action can be maintained in the name of the assignee. Bills of exchange and promissory notes form an exception to this rule; all other instruments not being negotiable or capable of being sued on except by an original party to the contract. Therefore, until our statute which makes bonds and other writings obligatory for the payment of money assignable,* such instruments were necessarily sued upon in the name of the original creditor, it being said that the person to whom transferred, was rather an attorney than an assignee. 2. B. C. 442. In a late English case in which an attempt was made by the endorsee of a bill of lading to sue in his own name, the Court heard the argument with considerable impatience, as contrary to a clear principle. Parke B., interrupting the counsel, said, by the law of England a chose in action is not transferrable; by the custom of merchants, it is transferrable in one instance, that of a bill of exchange. *Thompson vs. Dominy*, 14 M. & W. 403.

A guarantee is a special contract for the payment of some debt, or the performance of some duty in the case of failure of another person, who in the first instance is liable. Like all special contracts by parol, it requires a consideration to support it, which must move between the plaintiff and defendant, and this must be averred. It is essential to every action on a promise to state a consideration. *Bailey vs. Freeman*, 4 John. 280; *Price vs. Easton*, 4 B. and Adol. 433; *Lilly vs. Hays*, 5 Ad. and Ell. 554.

This contract comes within these principles; it is a contract that is not negotiable, and the suit can only be brought by the original party with whom the contract was made, and to whom the consideration enured. It cannot be sued upon by a subsequent holder in his own name.—*Lamourieux vs. Hewitt*, 5 Wend. 307; *True vs. Fuller* 21 Pick. 140; *McDeal vs. Yeomans*, 8 Watts. 361; *Snevily vs. Ekel.*, 1 Watts. & Ser. 203. See 1 Am. Lead.

* Rev. Stat. 801, § 2.

Cases, 181, 182, where these cases are cited, and the doctrine is sufficiently stated with the usual discrimination of the learned annotators.

It will be perceived that I do not put the case upon the ground that the guarantee does not purport to be made for the benefit of the subsequent assignees, or make any distinction as to the guarantee being endorsed on the instrument or otherwise. The foreign law, it seems, recognizes the negotiability of this contract, and Mr. Justice Story, perhaps influenced in some measure by his fondness for the civil code, intimates that it will depend upon the intention of the guarantor; that if the guaranty be endorsed on the back of the note, and is in terms payable to order, it acquires a general negotiable character, and any subsequent holder may maintain suit thereon who has received it in the ordinary mode of transfer. Story, notes §§ 481, 484. See 3 Kent 124, note (5th ed.) The difficulty is that the contract is not negotiable in its nature and how can it be made so by the intention of the parties? It is not a part of the note, bond or the like because endorsed thereon. The view taken by the learned Judge may possibly be supported upon the peculiar doctrine adopted in some Courts of this country, and to which he refers, that such guaranty amounts to the making of a *new negotiable note*, may be declared on as such, and the guarantor be held liable as maker. I do not, however, see how it can be maintained upon the acknowledged principles applied to the contract of guaranty, considered in its true light, as a collateral undertaking for the debt or default of a third person.

The doctrine that this special contract is not negotiable, is still more obvious in regard to the guaranty of a bond. The instrument is assignable so as to be sued in the name of assignee only by statute, and it cannot be pretended that the statute reaches the collateral contract, though endorsed thereon.

Watson vs. McLaven, 19 Wend. 557, was cited by the counsel of the plaintiff, but that is one of a series of cases presenting a different question. It was a case where a general guaranty to any one who would give credit to a particular person was held to become an available contract to him who gave credit upon its faith and according to its tenor. When a general letter of credit, which is a species

of guaranty, is accepted and acted upon, the undertaking which was before indefinite and at large, becomes definite and fixed, and a contract then springs up in favor of the person making an advance. In such case there is no transfer: it is a contract between the party who gives such general letter and the person who advances on the faith of that letter. See *Birkhead vs. Brown*, 5 Hill 643, and cases cited; *Walton vs. Dodson*, 3 C. and P. 162; *Carnegie vs. Morrison*, 2 Metc. 381. But if the guaranty or letter of credit, is special, addressed to or made in favor of any particular person by name, it is a contract with such person only, and can only be enforced by him.

Argument for the demurrant.

U. S. District Court.--Eastern District of Penn'a.

In the Admiralty.

THE SUSAN G. OWENS.

Opinion of Judge KANE:—The ship *Susan G. Owens*, was registered in the District of Maryland, as the property of citizens resident thereof. On the 21st of February last, then being at the port of Philadelphia, she was made a subject of an agreement between certain persons as agents for the owners, and Messrs. H. P. & S. S. Townsend. The agreement was as follows:—We, Mason, Kirkland & Co., of Philadelphia, agents for the owners of the ship *Susan G. Owens*, burthen 730 10-95 tons, lying in this port, do by these presents, sell said named ship to Messrs. H. P. & S. S. Townsend, for the sum of Fifty-four Thousand Dollars, to be paid in hand by them to the said Messrs. Kirkland & Co., in the following sums and periods as here stated, viz :

(\$10,000.) Ten Thousand Dollars to be paid within 15 days from this date, February 21.

(10,000.) Ten Thousand Dollars to be paid within 25 days from this date.

(29,000.) Twenty-nine Thousand Dollars to be paid within 35 days from this date.

(5,000.) Five Thousand Dollars to be paid in hand on the signing of this contract.

And the said sum (\$54,000) to be considered as deposited in the hands of Mason, Kirkland & Company, for the faithful performance of the said stipulation. And we, the said H. P. & S. S. Townsend, do, by these presents, agree to forfeit all our right, title and interest in the said sum of \$5000, and any further sums as they may be paid in, and also of all claim of ownership in said vessel, provided that we should fail to perform our portion of this contract as named.

On the faithful completion of the terms of this contract, Mason, Kirkland & Co. bind themselves, by these presents, to have the said ship Susan G. Owens, legally transferred to Messrs. H. P. & S. S. Townsend.

Witness our hands and seals this twenty-first day of Feb., A. D. 1849.

MASON, KIRKLAND, & CO. [L. s.]

H. P. & S. S. TOWNSEND. [L. s.]

Witness.

H. FRANK ROBINSON,
D. C. LANDIS. }

The Messrs. Townsend appear to have been in Philadelphia at the time of executing this instrument, but they had no domicile here in any sense, commercial or other. In fact, it would seem that they were merely adventurers who came here for the occasion, one of them intending to take passage in the ship for California, which was to be its destination.

They proceeded immediately to fit her out as a passenger ship, on a very expensive scale, and to lay in supplies and stores for a two years voyage. What her employment was to be after arriving out, does not clearly appear; whether she was to remain there as a receiving ship, or to trade as a Packet along the Western Coast; but the outfit was intended to be adequate to either object.

The contracts with the material men and others were not made by the Townsends in person. The captain sometimes alone, sometimes in company with the father of one of the partners who acted as agent of the concern, gave the orders, and they were executed as it appears in all cases on the credit of "*the vessel and her owners.*"

Their means and credit were very soon exhausted. They paid \$5,000 upon the execution of the agreement which I have recited; but when the first instalment fell due—fifteen days after—they were only able to pay one-fourth of it. And at some early period of their transactions, they were glad to borrow \$500 from one of the libellants.

At last, on the 25th of April, finding themselves altogether unable to prosecute their intentions, and the vessel having been attached in this court, at the instance of numerous libellants, they assigned their contract of purchase to the present claimants for the sum of \$25,000, and the ves-

sel was registered anew in the port of Philadelphia, as the property of residents of this district; the entire ownership of the ship and her out-fits vesting accordingly in them.

The demands before the court are against the ship, her tackel and apparel by ship chandlers and other material men, and by the stevadors who stowed the cargo and stores; all of them founded on contracts made before the transfer of the 25th of April. They are resisted upon the ground that the vessel was a domestic vessel in her home port, where the owner was at the time of contracting, and that therefore she was not liable upon an implied lien for supplies or stowage services.

The other points which were made in the case, I do not think it necessary to consider. What is meant by ship chandlery in the Pennsylvania Act of Assembly, and whether a domestic vessel is, or is not, specifically liable to the Stevadors, were questions elaborately and ably discussed in the argument; and so was the other question, whether the opinion of the Supreme Court in the case of *The General Smith*, 4 Wheat. 438, is to be regarded as conclusively establishing the distinction between foreign and domestic ships, as to a specific liability for repairs and out-fits.

It would not perhaps be difficult to decide all of these questions; but it will be time enough to do so when they shall be necessarily involved in the determination of a cause before the Court. But the present does not seem to be the case either of a domestic vessel, or of a vessel domestic or foreign, contracting through the instrumentality or in the presence of the owners. The vessel was registered in a foreign port, and her legal owners resided there. The Townsends had only an equitable and contingent, or at best, a defeasible interest in her; and moreover, they were not residents of this district.

Now, whether we turn to the law maritime of the world, or to the modification of it which is asserted in the case of *The General Smith*, there can be no doubt but that a vessel thus circumstanced becomes liable for repairs and supplies generally.

The general maritime law recognizes no distinction in this respect between foreign and domestic vessels. Both are liable on the civil law principle that whoever has contributed to the preservation, or the increased value of property, has a *privilegium* in it for the amount due to him in return.

The distinction which has been admitted into our law on this subject is not found, that I am aware of, in either the ancient or modern law of any other country.

The *Consulado* ch. 32, as quoted by Boulay Paty, (1 cours de Droit mar. 121*) says, that if a new vessel before making her first voyage is

* I quote from Boulay Paty, because the arrangement and notation of the chapters of the *Consulado* are not uniform in the different editions, and I am unable at the moment to find the original passage in Pardessus' translation, which is the only one accessible to me.

sold at the instance of creditors, the carpenters, caulkers, and other workmen, as well as the persons who have furnished the timber, the pitch, the spikes, and other things necessary for her construction, shall be preferred to all other creditors whatsoever."

The *Guidon*, ch. 9 sect. 1, says: "The debts contracted by the master of a ship for repairs, provisions, supplies, or other things for voyages (*entreprises*) determined on, have a special hypothecation in their favor upon the proceeds of the freight, in preference to anterior debts, whether by hypothecation or otherwise." 2 *Pard. Lois. Mar.* 424.

The laws of the Hanseatic League, (Anno 1614,) title 5, sect. 7, authorize the captain in case a part owner shall refuse to contribute his share of the out-fit, to take up such amount as may be needed, on the credit of the vessel and on the profits of the voyage, and to hold his share of them answerable jointly, with those of the other part owners. 2 *Pard. Lois. Mar.* 546.

A provision altogether similar is found in the maritime code of Sweden (Anno 1667,) part 3, ch. 2, and is applied with appropriate modifications to the case of advances for the construction of the vessel and the payment of the crew—part 4 ch. 9 of same code—3 *Pard. L. M.* 160, 161, 169.

So too by the Danish code of 1683, book 4, chap. 5, 59, the vessel is specially hypothecated for all moneys lent for the construction of the ship, or the support of the workmen engaged in building her; and this *privilegium* continues and may be enforced until she has sailed on her first voyage.—3 *Pard. L. M.* 301.

The *Water brieven* hypothecation of the Netherlands for which a remedy is given by the Ordonnance of Gordrecht, (Anno 1533,) is to the same effect. See 4 *Pard. L. M.* 165 and 167, and the notes.

The Ordonnance of Louis 14, (Anno 1681,) which Judge Washington recognized in the case of the *Seneca*, as a compend of the law maritime of the world in arranging the order in which privileged debts shall be paid, (book 1 title 16,) enumerates as well advances for repairs and out-fit before departure, as for necessities furnished abroad. And Valin, in his commentary on this title, (1 vol. 363,) says, that this of course includes the debts due to all those mechanics and others who have supplied necessities for the voyage. Emerigon (*Contract Gr. Avent.* sects. 3 and 4) does the same; and he is followed by Boulay Paty, [1 *Cours Dr. Mar.* 121, 122,] who adds that the modern law of France is to the same effect. All these writers give, indeed, a different and higher rank to the *privilegia* which accrue, pending the voyage, than to those originating in the home port; but they unite in awarding a preference to both over the general creditor, or the party claiming under an elder bottomry bond.

The modern law of Holland agrees with this; [see Lord Hardwicke's

opinion in *ex parte Shank*, 1 Atk. 234,] and indeed, after looking with some care through the different maritime codes of Europe, as collected by Pardessus, I do not know that any commercial State on the Continent refuses to the material man any implied lien on a domestic more than on a foreign ship.

In England and Scotland the same rule obtained as on the Continent during a long series of years; the Admiralty enforcing the liens. The agreement made at Whitehall, 18 Feb., 1632, by all the Judges, before the King and Privy Council, sect. 3, [Godolph 157,] expressly negatives the right of the Common Law Courts to issue writs of prohibition in such cases. Even as late as the year 1777, Lord Mansfield, in the case evidently of a domestic vessel, [*Rich vs. Coe Comp.*, 639-640,] declared that by the English Law, "whoever supplies a ship with necessaries has a treble security:—1. The person of the master. 2. The specific ship; and 3, the personal security of the owners, whether they know of the supply or not. And in deciding that the owners in that case were liable notwithstanding some special circumstances, he argues from the unquestioned liability of the ship, is enforced by the Admiralty process. "Suppose the ship," he says "had been impounded in the Admiralty Court, the defendants could never have taken the ship out of the Court without paying the debt for which the ship was impounded."

I know, indeed, that prohibitions had issued before this period, to restrain the English Admiralty from entertaining the claims of material men; and that of later years, that Court has very reluctantly foregone the exercise of this branch of its ancient jurisdiction. But the English cases did not formerly, nor do they now, recognize a distinction in this respect, between foreign and domestic ships, except in so far as they are based on the statute of 3 and 4 Victoria, ch. 65. Both are equally excluded from liability to an implied lien for materials and supplies by the law of England, as both are equally made subject to such a lien by the general law of the sea. [See the cases collected in Abbott, part 2, ch. 3.]

The case of the *General Smith* established for the United States a rule on this subject differing, I humbly conceive, as much from that of the English as that of the Continental Courts. It is this "Where repairs have been made or necessaries furnished to a foreign ship, or to a ship in a port of the State to which she does not belong, the general maritime law, following the civil law, gives the party a lien on the ship itself for his security, and he may well maintain a suit in rem in the Admiralty to enforce the right. But in respect to repairs and necessaries in the port or State to which the ship belongs, the case is governed altogether by the municipal law of that State, and no lien is implied unless it is recognized by that law." (Per Story J., delivering the opinion of the S. C., 4 Wheat. 438.)

It is not perhaps altogether easy to harmonize the language in which this opinion is expressed, with the remarks of Judge Johnson in delivering the opinion of the same Court in the *St. Jago de Cuba*, 9 Wheat. 409. Judge Story, it may be observed, derives the lien in the case of a foreign ship from the civil law as adopted into the maritime code of Nations.—Now, by that code, the master can hardly be said to acquire his authority to constitute implied liens for either out-fits or repairs from his character of *prepositus* or agent of the ship owner. He is indeed regarded in that character by the Roman Law, and as such he may bind not only the specific ship, but the owners *in solido*, and even make them liable for his delicts; this authority being implied from necessity, and therefore suspended while the exercitor—his constituent, is present. But the qualified power of the master under the law maritime, while it is much more limited in some respects, is in others more ample, or at least less dependent. Thus on the one hand his power extends only to a charge upon the ship, and that for legitimate contracts; the owner may avoid personal liability by abandoning his interest. But on the other hand his authority as manager (*gerante*) or representative of the ship and its interests, being specific as to them, continues so far as regards these implied liens, whether the owners be present or absent. [See the argument of Judge Ware, in *The Phæbe*, Ware 267, &c.,] and such I understand from the language of Judge Story, on many occasions, to have been his meaning in the case of *The General Smith*.

The reasoning of Judge Johnson, however, in the case of *The St. Jago de Cuba*, refers the master's power to a somewhat different theory, and applies to it a different limitation accordingly. "The necessities of commerce require, he says, that when remote from the owner, the master should be able to subject his owner's property to that liability, without which it is reasonable to suppose he will not be able to pursue his owner's interests. But when the owner is present, the reason ceases, and the contract is inferred to be with the owner himself on his ordinary responsibility without a view to the vessel as the fund from which compensation is to be derived."

But whether we take the law as it is laid down by the Court in the case of the *General Smith*, or limit it as was done in that of the *St. Jago de Cuba*; the result as to the *Susan G. Owens* is the same. Where did she belong? and who were her owners?

Her register, the document by force of which she has any national or home character whatever, without which she is alien every where, declares that she belongs to Baltimore. The act of Congress, under which this registry was made, enacts that on a change of the ownership a corresponding change shall be made in the register;—no such change was made.

The grand bill of sale, the universally accepted and looked for evidence of a transferred title to ships and vessels, required not merely by a municipal regulation, but as Sir Wm. Scott says, in *The Sisters*, 5 *Rob.* 142 *Am. Ed.*, by the universal law of the sea, is not made; the registered owners stand out to the world as the owners and only owners.

And thus, holding the legal title, they first permit the libellants on the invitation of third persons, to make and perform contracts for repairing and out-fitting the vessel, which add largely to her value; and then, they or their grantees (for the claimants here are only grantees of the former registered owners, and do not affect to come here in any other capacity,) they come here in full possession and enjoyment of the vessel thus largely meliorated, and claim that neither they nor their vessel shall be held liable for the price of the repairs and out-fits so furnished her. The material men are to look, not to the legal owner at the time of their contract, not to the legal owners now, not to the vessel itself—but to certain conduit-pipes of an equitable, contingent, defeasible interest—cosmopolitan gentlemen who were to have been the owners, had they been able to complete their bargain or had not found it more safely profitable to assign it away.

The very statement of such a defence is enough. If the lien of a material man could be avoided by an arrangement like this, it might as well rest at once upon the ship owner's honor. It would only be necessary for him to vest for the time some equitable interest in the captain of his ship, and she might visit every port of the United States in succession, and collect supplies at them all without incurring a liability. Every port would be a home port for her.

But even regarding the Townsends as the owners, the argument of the defence is not less inconclusive. Because these gentlemen are residents no where else, it can hardly be said to follow that they must be domiciliated here; and if the home port of the vessel is dependent on the domicile of the owner, may we not be led to the conclusion that both are homeless alike. Certain it is, that the argument would exempt a vessel from liability to a specific lien precisely in those cases in which such a lien is most needed—the cases namely in which she is most unequivocally a stranger to the port, and personal recourse against her owners least available.

I cannot find anywhere the warrant for so marked a departure from the established policy of the maritime law. It is emphatically the law of fair dealing and well protected confidence;—looking with a liberal spirit to the general interests of navigation, holding foreigners and citizens as members alike of that great community in which commerce has united mankind, securing credit and aid to the ship owner every where, by securing payment to all who trust upon the credit of his ship, but watching

jealously against oppression and fraud, however masked or tricked off in the semblance of legal formulas. Such is its policy; and I am constrained to add that I have rarely known it more essentially contravened than it would by sustaining this defence.

The decrees must be for the libellant's with full costs,—in the case of McDermott, in the amount claimed by him—in the other cases, the amount to be ascertained by a Commissioner from the evidence upon the files. I have no doubt upon the proofs as to the other facts which have been controverted in the cause.

Decrees accordingly.

Mr. Barnes, Mr. Van Dyke, Mr. Donegan, for Libellants.

Mr. G. M. Wharton. Mr. Kennedy, for Respondents.

Supreme Court of Pennsylvania.—Western District

[Reported for the American Law Journal by JAMES S. CRAFT, Esq.]

ABSTRACTS OF DECISIONS.

PITTSBURG.

Hall & Speer, vs. Assignees of Warrick, Martin & Co. BURNSIDE, J. It has ever been the law of Pennsylvania, that the payment of part of a debt, in satisfaction, if the creditor agrees to receive the smaller sum in full, is a discharge of the whole demand, when such agreement is fully executed.

A payment in full of other creditors by the debtor embarrassed when the above agreement was made, is no violation of it, so as to authorize the creditor to claim the balance as a set off against another claim by the debtor's assignees.

Although it was agreed that the creditor, besides receiving a sum certain, (which was paid,) should receive as much more as would give him a dividend equal to the other creditors, the payment of other creditors in full, or the debtors neglect to make an assignment until execution attachments were issued, and a lien on their effects created under which such attachment creditors recovered the whole, will not invalidate such executed agreement, and raise up in its former force the original debt.

Irish vs. The Treasurer of Allegheny county. GIBSON, C. J. In a suit against the obligor of a bond, given after a tax sale by the purchaser, for the payment of the surplus, he cannot contest the former ownership of the person as whose land the property was sold. The judgment will be rendered in favor of the legal obligee. This protects the obligor against a second recovery. His payment to the Sheriff would discharge him, in analogy to *Cox vs. Blanden*, 1 Watts 533. The defendant has nothing to do with fiduciary interests, as in 5 Watts 69. 3 Barr 136.

When the land sold is owned by several, they must litigate disputes among themselves for their respective parts after the money has been brought into court. To give notice to the Sheriff not to pay it over to the legal plaintiff it is enough to mark the suit for the particular use, and to protect the obligor from a vexatious use of the action, the court have power to restrain it.

If the party suing the bond has any interest in it, he may sue thereon—if he has none, the court may quash or stay the writ, but cannot entertain a defence on the ground of his want of interest, which may result in a verdict and judgment against those who are interested.

The ground rent reserved on the property under a perpetual lease, cannot be set off by the obligor—for there was no "dealing" between the obligor and obligee respecting it. The assignee of such a lease has a privity of estate but not of contract with the lessor, 3 Rep. 23.

Pitt Township vs. Malcolm Leech. BURNSIDE, J. Whether a township warrant, signed by a clerk under a general authority for a supervisor, (who could neither read or write,) was sufficiently authorized, was properly left to the jury to determine, although there was no evidence of special authority to sign this particular warrant.

Orders drawn on townships or counties ought not to be sued until presented for payment, yet where the township was insolvent, the court will not reverse where that objection was not strictly in issue.

Gossin & Denny vs. Brown. BELL, J. Where there are no special circumstances manifesting a determination to obliterate the original obligation of a principal debtor and his surety, and to destroy the securities taken for its payment, equity will regard them as still subsisting for the benefit of the surety.

Acceptance of choses in action by collateral assignment from the principal debtor to the surety, will not be regarded as a relinquishment of prior security.

Actual assignment of a mortgage given to the creditor for his and the surety's security, was not necessary when the surety paid the debt. The surety's right of subrogation requires no such assistance by an unessential ceremony. The mortgagee had not the power to compromise the rights of the surety by entering satisfaction on the mortgage. Such an attempt would be regarded as fraudulent and inoperative against the surety.

Notice of an absolute deed, which was accompanied by a private defeasance, given to a surety after he had incurred his liability on the faith of a bona fide, though subsequent mortgage securing such surety, will not affect the validity of such mortgage.

Taylor vs. M'Cune. BELL, J. The guarantor of a note, &c., cannot discharge himself for want of notice of its non-payment, unless he can shew by positive evidence or fair inference that he has actually sustained loss by the omission, as in case of the insolvency of the party primarily liable occurring subsequent to maturity of the note.

A note &c., informally endorsed, is construed according to the evidence attending the engagement. The question is whether the object of the endorsement was to give credit to the maker of the note, with the party to whom it was passed, resting on the good faith of the endorser. If so, the intent authorizes the holder to write over the blank endorsement an express undertaking to pay the money.

Floyd vs. Williams. BELL, J. A note to which there is a subscribing witness may be proved by the confession of the maker, that it was his handwriting, and perhaps by the testimony of other witnesses proving

his hand writing (secus as to a bond 6 Barr 347.) Cases referred to 6 Binn. 16, 5 S. & R. 314, 1 D. 228, 2 Johns. 451, 3 Johns. 477, 16 Johns. 202, 2 Wend. 576.

Tom Ferry vs. Henderson & Wife. COULTER, J. The plea of the statute of limitations is not a bar to a bill in Equity filed by a negro for the value of his services and during a time when he was in truth a free man, but kept in ignorance of his rights and compelled to serve. Nor will such statute run until said negro was informed that he was free while thus compelled to serve.

Hall vs. Wilson. COULTER, J. The statute of limitations will not protect a constructive possession of land as attached to a survey, where there is also such constructive possession of it as attached to an elder survey—7th Barr. 392, especially where it was purchased and annexed to another survey and used as woodland before the twenty-one years were complete.

Lytle's Estate. Per Cur. The court may have the power to overturn a decision of the Orphans' Court on an auditor's report depending on questions of fact, but the exercise of such power is justifiable only in an extreme case.

SEPTEMBER 25, 1849.

Verner vs. Cooper. GIBSON, C. J. Devise—I give and bequeath to my minor children, to wit: my son J. D. V., my son A. V., my daughter R. V., and my daughter E. V., all the estate, real and personal of which I may be possessed at the time of my decease, with the improvements thereon, &c., to be equally divided amongst them share and share alike, when the youngest of them shall arrive at the age of 21 years; and in case one or more of my said children should die before a division shall be made as aforesaid, then the share or shares of the deceased child shall be equally divided amongst the survivors of my minor children.

R., the eldest daughter, after her father's death, married J. C. and died, after having arrived at the age of 21 years, but during the minority of the younger sister E., and before division of the property devised, leaving issue A. V. C., the plaintiff below.

The share devised to R., on her arriving at the age of 21 years descended to her heir at law. Spalding vs. Spalding, Cro. Car. 185. Labor vs. Long.

Keith vs. Stewart. COULTER, J. The assignee of an agreement for the sale of land, cannot rescind the assignment and recover back the consideration of it, without offering to re-assign it and re-delivering possession.

If the assignee cannot obtain a title from the vendor as it was stipulated by the assignor, he could on the purchase money being paid; his proper course is to bring an action against the vendor, or let the vendor sue him, and then have recourse to his assignor if the result of such suit authorized such recourse.

McFarson's Appeal from the Orphans' Court of Allegheny county. BELL, J. Whenever a Chancellor would direct a conveyance to be made on discharge of a decedent's undertaking the proper Orphans' Court is bound to interpose its statutory authority with like effect. Acts of March 1792, 1818, 1834. Chess's Appeal 4 Barr. 52.

The application under said acts is to be made to the Orphans' Court where the vendor lived and died, although the lands lie in another county.

A joint purchase in a father's name for himself and the son to which the son contributed an equal share of the price, followed by an informal

partition, a distinct possession of the purparts and improvements, presents a resulting trust for the interposition of equity.

Any memorandum in writing indicative of the intent of the parties, so precise as to ascertain the terms of the contract, the land to be conveyed, and the price to be paid for it, is sufficient within these statutes. Executory contracts for the sale of land, like wills, are interpreted to give effect to the intention of the parties.

Possession is not necessary to a written contract respecting land.

Constructive possession or seisin of the land by the vendor, at the time of his death, satisfies these statutes.

Specific performance decreed by the Supreme Court on satisfactory evidence, although refused below.

SEPTEMBER 28.

Remington vs. McGowan. (Bill in Equity.) BELL, J. This case involved the question of the jurisdiction generally of Equity in the Commonwealth over the delivery of specific chattels. The extent of the remedy was defined with great research and acumen by the opinion of the Judge, so that an abstract would be incompetent to do him justice.

The Court sustained the bill of the complainant, who had been a surveyor, and retiring from the business, left sundry maps, drafts, plans, notes of surveys, and *surveyor's instruments and furniture* in respondent's hands, of which he sought the restoration. The decree was affirmed on the ground that the bill set forth a trust, and that the remedy at law of a compensation in damages was inadequate, and that when Chancery commenced a proceeding it would cover the whole ground, whether of remedy or property.

OCTOBER 1, 1849.

Irwin vs. Nixon's heirs. ROGERS, R. It was contended for the plaintiffs below, (defendants in Error,) that this case as now presented, involved a question not agitated in the case of *Fetterman vs. Murphy*, 4 W. 434, where the same title on the same facts was considered and adjudged, viz: that although the judgment on the scire facias revived the debt, it did not restore the lien, or connect that lien with the original lien of *the judgment obtained in the life time of the intestate*. This Court ruled: That the judgment on the scire facias, confessed by an attorney for the administrators on notice to them prior to the act of 1834, judicially disproved the entry of satisfaction made on the docket, and the return of "money made" on an execution issued on the original judgment, and revived that original judgment with all its incidents, including that of lien.

They further ruled: That as a second innocent purchaser had bought on the faith of the judgment of the Supreme Court, and made large improvements during nine years in sight of the present claimants, that he ought, therefore, to be protected in his purchase, acquired in such confidence and retained under such acquiescence.

Thomas vs. Sloan. Warren county. ROGERS, J. It is not sufficient evidence of a lost note that a witness proved he had seen a note such as declared upon, having the same name as that of the drawer attached to it, without some evidence that it was the drawer's hand writing, either from the belief of the witness founded on sufficient knowledge, or from other evidence.

Wilkins vs. Anderson. COULTER, J. An entry on the trial list—being one of a regular series, bound in books and carefully preserved, not of a special court, (*Moore vs. Kline* 1st Pa. 129,) but of the stated Court

of Common Pleas of Allegheny county, made by the President Judge, in open court, of the substitution of a defendant in ejectment, is alone sufficient evidence of such substitution, to make such defendant a party to the record, although not transferred by the clerk as those entries generally were, and after trial and judgment to warrant an execution and sale of said defendants property for the costs of an unsuccessful defence.

A receipt by the defendant thus substituted, given to the Sheriff four months after arrival at age, for the residue of the purchase money arising from the Sheriff's sale, would confirm such sale made during minority, if the above entry were irregular and not authentic.

The purchaser at such Sheriff's sale being the brother-in-law of defendant and executor of her father, and also assisting as one of the heirs in defending such ejectment and preserving the property as assets of an indebted estate, (see *Wilkins estate* 9 Watts 132.) is neither evidence of fraud, trust or notice.

The refusal of the Court below to permit defendant's counsel to address the jury is not the subject of error, as in *Lee vs. Lee*, 9 Barr. 169; unless excepted to.

Steele vs. Steele's ex'rs. ROGERS, J. Services performed for a father and at his request by a son living at a distance with a family of his own to support, are sufficient to imply an assumption.

A debt due by an intestate cannot be set off against a vendue note given to the administrator.

The rule in *Fritz vs. Thomas*, 1 Wharton 66, equally applies whether the promise was made before the debt was barred by statute, or after.

Johnson vs. Sinnell. (Erie co.) BELL, J. An agreement by two joint purchasers of land to pay back to a third person money which he had advanced to them for an interest in their speculation on his relinquishment of any interest in it, the third person not being recognized by the vendor of the land, constitutes no interest in land, but may be enforced as a parol contract, not within the statute of frauds.

A set off which had been offered in a former action and disallowed;—(because not then due)—may be received and allowed in a subsequent action. Whatever may have been the defendant's right to set off instalments actually due, if he claimed a set off for all due *and not due* as an entire thing, it was rightly rejected.

Where a set off was rejected on two grounds—one of which was a legal objection, its rejection on the other ground for which the only remedy if it had stood alone, would have been by writ of Error, will not prevent its repetition and reception in a subsequent suit.

Truesdale vs. Watts. (Erie co.) COULTER, J. A note which it was agreed should be given up, in payment of work to be done, may afterwards be recovered, if the work is not completed according to contract.

A voluntary declaration by the party for whom work was to be done that he would pay an additional price for it, not communicated to the working party until after the work is done—is not binding.

Guthrie vs. Horner. BURNSIDE, J. The following charge was held to be erroneous:—"That laborers and material men working without contract on a job, have both the owner and contractor for their pay. And if the owner gives a note or agrees to pay the laborer his wages, he cannot set up a failure of the contractor unless it was so understood and agreed upon when the note was given." The law is that the owner is in no event liable to a laborer hired by the contractor. 8 Barr 463.

If the holder of a note relies on confirmation of it after a full knowl-

edge by the drawer that the consideration had failed, he must prove such drawer's knowledge of such failure.

Hartzell vs. Sill. BURNSIDE, J. The case of *Hoy vs. Sterret*, 2 Watts 327, cited and applauded; also *Hetrich vs. Deachler*, 6 Barr 33.

The riparian owner has a right to use the water for all lawful purposes on his own land, whether he uses the old flutter wheel, or the modern scroll wheel.

HARRISBURG, [MAY TERM.] 1849.

[Reported for the American Law Journal, by P. C. SEDGWICK, Esq.]

Easton Bank vs. The Commonwealth. Dauphin. BELL, J. The accountant officers of the Commonwealth have power under the act of 30th March, 1811, to state and settle an account between the Commonwealth and a bank, for a tax due the State on dividends.

Where the Legislature passed a law in March, 1824, granting a charter to a bank to continue until May, 1837, and imposed upon the bank a tax of 8 per cent. annually upon its dividends, another act passed on the 1st April, 1835, increasing the tax on the dividends from that date, is constitutional.

Where the non-payment of a claim is owing to mutual misapprehension, or to the laches of the creditor, interest is not of course demandable. Affirmed.

Farmers' and Mechanics' Bank vs. Woods. Cumberland. BELL, J. Though an improvement title will hold for 300 acres, conveniently located, yet if the improver does or omits to do any thing to show his intention to claim less, his right may be circumscribed within much narrower limits.

Here the improver saw another warrant and survey without objection; paid taxes for many years for fifty acres, and was guilty of negligence in omitting to assert and perfect his original privilege, while his antagonist paid taxes for the disputed land. In effect the improver disclaims liability as owner.

His omitting to locate his 300 acres will postpone his equity to the legal title of the warrant and survey, and all together these acts will amount to a legal abandonment. Reversed.

COURT OF COMMON PLEAS OF PHIL'A. COUNTY.—MARCH T., 1849.

[Reported for the American Law Journal by F. C. BRIGHTLY, Esq.]

BRIERLY vs. TUDOR.

On the completion of a building, the party wall is the property of the owner of the house, and not of the contractor.

This action was commenced before Alderman Camp-

bell, on the 19th May, 1842, to recover the moiety of the cost of a party wall of a house which plaintiff built for Mrs. Jane Wands, back of Lisle, below Shippen street.— The alderman gave judgment for the plaintiff for twenty-six dollars and costs, from which the defendant appealed. In the Court of Common Pleas a *non pros.* was entered for want of a declaration under the rule of Court, after which the parties agreed upon, and stated the following case for the opinion of the Court :

“The plaintiff in the above suit contracted with Jane Wands, for the erection of a brick building, for a certain sum of money, which contract was fully performed. Under an agreement with the said Jane Wands, the defendant in the above suit used the party wall of said building, in the erection and construction of an adjoining building, whereupon the said plaintiff brought this suit for the price or value of said party wall, alleging that the said party wall belonged to him as contractor and builder, and not to Jane Wands, the owner of the building. It is hereby agreed, that should the Court be of opinion that the said party wall belongs to the plaintiff, then the *non pros.* to be taken off, and the judgment affirmed ; but, if of opinion that the same belongs to the said Jane Wands, then the *non pros.* to remain.”

Joseph S. Brewster, Esq., for Plaintiff.

Samuel F. Reed, Esq., for Defendant.

May 20, 1844, the Court, KING, President, after argument, gave judgment for the defendant on the case stated and ordered the *non pros.* to stand.*

* The act of 24th March, 1812, sect. 13, 5 Smith, 345, regulating party walls in the township of Moyamensing, (in which the building in question was situated,) provides that “the first *builder* shall be reimbursed one moiety of the charge of such party wall, or for so much thereof as the next builder shall have occasion to make use of, before such next builder shall use or break into the wall.” In *David vs. Hanes*, 1 Am. Law Jour. 424, the Supreme Court decided that the party by whose order a house is erected is the *builder*, and liable for the value of the party wall, although the house was erected under a contract for a gross sum, “including party walls,” which have been paid. F. C. B.

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In Chancery--4th Circuit.--New York.

HULDAH A. BARBER, BY HER NEXT FRIEND, GEORGE CRONKITE,
vs. HIRAM BARBER.

What acts of the husband will justify a wife in leaving her husband's house. What constitutes "*crudely*"—what "*indignity*"—and what a ground for divorce from bed and board.

In July, 1844, the complainant filed her bill for a divorce *a mensa et thoro*. From the pleading and evidence it appeared that the parties were married on 12th Nov. 1840. That on the 5th Nov. 1842, the now defendant filed a bill to dissolve the marriage on the ground of fraud in misrepresenting and concealing a physical incapacity to enter into the marriage state by reason of her "uterus and vagina being in a schirrous, cartilaginous and ulcerated state, and unnaturally thickened and indurated."—That about 8 months after the marriage, the defendant refused to cohabit with her. That she continued to re-

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side in his house until informed of the charges upon which the defendant sought to obtain a divorce—that for this reason, in addition to the previous cruelty and indignities referred to in the opinion of the Judge she left his house on the 18th Nov., 1842—since which time she has received no support from the defendant. That the complainant in this bill was subjected to a painful examination of her person on the trial of the bill filed by the now defendant, in which the charges of physical incapacity and fraud were shown to be unfounded, and the bill for a divorce from the bonds of matrimony filed by the now defendant was dismissed on the 18th Dec. 1843. That the now complainant was a widow at the time of her marriage with the defendant, and had, by her former husband, a daughter named Adelia Cronkite, and that the defendant on several occasions, in his own house and elsewhere, took indecent liberties with the person of the said Adelia Cronkite, and attempted to have carnal connexion with her—that this fact, with the other circumstances of cruelty and indignity referred to, were communicated to the complainant before she left the house of the defendant.

The pleadings and evidence occupy too much space for insertion in the Journal at length. All that is material is given above and in the following valuable opinion delivered on 30th August, 1846, by

WILLARD, V. Ch. The revised statutes, article 4, sec. 1, ch. 8 of part 2d, authorize this court to decree a separation from bed and board forever, or for a limited time, on the complaint of a married woman, for the following causes:—1. The cruel and inhuman treatment by the husband of his wife. 2. Such conduct on the part of the husband towards his wife, as may render it unsafe and improper for her to cohabit with him—and 3d. The abandonment of the wife by the husband, and his refusal or neglect to provide for her. The bill in the present case

is so shaped as to embrace all the above named causes of separation.

1st. In determining what is cruelty, or the *soevitia* of the ecclesiastical law, we must look into the cases decided by the courts having jurisdiction in matrimonial cases. It is difficult, and perhaps, hardly safe to define, in terms sufficiently clear and comprehensive, what constitutes cruelty in a legal sense. Lord Stowell has laid down the rule in several cases. In *Evans vs. Evans*, 1 Hagg. Ecc. Rep. 35, he observes that the causes must be great and weighty, and such as shew an absolute impossibility that the duties of the married life can be discharged. What falls short of this is with great caution to be admitted. What merely wounds the mental feelings is in few cases to be admitted, when they are not accompanied with bodily injuries, either actual or menaced. Mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention and accommodation, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty. They are high moral offences in the marriage state undoubtedly, not innocent surely in any state of life, but still they are not that cruelty against which the law can relieve. Under such misconduct, the suffering party must bear in some degree the consequences of an injudicious connection; must subdue by decent resistance or by prudent conciliation; and if this cannot be done both must suffer in silence. Similar principles were advanced in *Harris vs. Harris*, 2 Hagg. Ecc. Rep. 154; 2 Phill. 111, and in *Warring vs. Warring*, *ib.* and in *Holden vs. Holden*, 1 Hagg. Ecc. R. 458.

But while the general ground on which the court proceeds is to guard the wife from actual violence or danger to her person, there are nevertheless exceptions to this rule. Thus spitting on the wife has been adjudged a gross act of cruelty, on the ground, it is presumed, of indignity

to the person. See *D'Aguillar vs. D'Aguillar*, 1 Hagg. Ecc. R. 776. Shelf. L. of Mar. & Div. 430. So also the husband's attempt, when affected with the venereal disease, to force his wife to his bed, is of a mixed nature, partly cruelty and partly evidence of adultery. *Durant vs. Durant*, 1 Hagg. Ecc. R. 733, 767. So also the husband's attempts to debauch his own women servants is a strong act of cruelty—(*Popkin vs. Popkin* 3 E. E. R. 325 notes, Shelford L. of M. & Div. 430)—perhaps not alone sufficient to divorce, but which might weigh, in conjunction with others, as an act of considerable indignity and outrage to his wife's feelings. The attempt to make a brothel of his own house is brutal conduct of which the wife has a right to complain. This is the language of Lord Stowell in *Popkin vs. Popkin*. Also a groundless and malicious charge against the wife's chastity, followed up by turning her out of doors, and not attempted to be pleaded or proved, may be alleged with other acts of cruelty as a ground for a separation. *Durant vs. Durant*.—*Supra*.

Such is the rule with respect to the term *cruelty*—although primarily it has reference to such conduct in the husband as may endanger the safety or health of the wife; yet it may exist where there is no danger to her person, as in spitting upon her; and also where no actual personal violence was inflicted upon her, as in attempts on his part to debauch his own servants; and see also *Otway vs. Otway*, 2 Phil. 95; and *Hulme vs. Hulme*, 2 Adol. 27, that cruelty may exist without actual violence to the person.

The question then arises, has the complainant brought this case within the above rules. The bill sets up, as one of the grounds of complaint, that the defendant attempted in his own house, to seduce, debauch, and carnally know Adelia Cronkite, the complainant's daughter, by a

former marriage. This is denied by the defendant, but as an answer under oath was waived, the denial has no other effect then to put it in issue as a pleading. The fact itself is proved by the testimony of Adelia Cronkite. She states that she became an inmate of the defendant's family soon after his marriage with her mother in Nov. 1840. The first advance the defendant made to her was in the fall of 1841, when he gave her a ring—a few weeks after, while she was reading in a chamber at the defendant's house, he came into the room where she was and put his arm round her neck and took her by the bosom—she escaped from him and went down stairs. In the winter following, that is 1841–42, she boarded at her uncle's, (Mr. Cronkite,) in the village of Glenn's Falls, about five miles from the defendants, and attended the academy.—The defendant spent a night at Mr. Cronkite's, and in the evening, Adelia, at the request of Mr. Cronkite, conducted the defendant to his lodgings. When in the chamber the defendant put his arms round her and kissed her several times—she escaped from him, but he caught her again and threw her upon the bed and put his hand upon her privates. She escaped from him and went down. On a subsequent occasion at his own house, while she was watching with a sick brother, he drew her into another room and took indecent liberties with her. All these facts were communicated by the daughter to the complainant, and I am satisfied that she has given substantially a true relation of those transactions. If the attempts by the husband to seduce a female servant in his family is *cruelty* to the wife, within the meaning of the rule, much more is such attempt *cruelty* when it relates to a female, a domestic in his family, the daughter of his wife, and to whom he was standing in *loco parentis*.

These acts on the part of the defendant are not a solitary act, the result of sudden passion, but are repeated on

different occasions, thus indicating a settled purpose on his part to destroy the chastity of that young lady.

Another charge made by the complainant is the exhibiting by the defendant of his bill against her for a divorce on the ground of her physical incapacity to enter into the marriage state ; the mode in which that suit was conducted ; her distressing examination by surgeons on his application ; and the final dismissal of the bill. That the bill was filed without probable cause is obvious from its result, as well as from an examination of the testimony taken therein. There is strong reason to believe that it was *maliciously* filed with a knowledge on his part that the main allegations in it are untrue. In his bill against her, the gist of his complaint is that she was physically incapable of entering into the marriage state, and was herself guilty of fraud upon him, in undertaking the marriage.— In his answer to the present bill he admits sexual intercourse with the complainant shortly after the marriage, and alleges that he became diseased thereby. Both allegations can not be true. The fact of such sexual intercourse is admitted by her, and she alleges that she became pregnant by him, but miscarried in consequence of excessive labor in his employment. There is no evidence that the defendant became diseased in his person by reason of his intercourse with her ; or indeed, that he was so diseased at all. Nor is there any evidence that the complainant became pregnant by him, save in her answer under oath to his bill for a divorce.

If, as was held in *Durant vs. Durant*, *supra*, the making a groundless charge of criminality against the wife is an act of cruelty within the meaning of the rule, and will in connection with other facts lay a ground for a divorce, much more will an unfounded prosecution, based upon a groundless charge, be deemed cruelty, especially when the investigation of that charge leads to a distressing per-

sonal examination of the party, as in the present case.—The broad proposition that an unsuccessful suit for a divorce by the husband against the wife in itself considered, is such act of cruelty as to enable the wife to obtain a limited divorce from the husband, will not be pretended. Such a rule would be of dangerous tendency. But when the suit is without probable cause and is connected with other conduct of the defendant, such as refusing to live with her, refusing to support her, and with his criminal act in attempting to seduce the complainant's daughter, the whole may be treated together as cruel conduct on the part of the defendant, justifying the interposition of this court.

2d. As to abandonment of the wife by her husband : The defendant has repeatedly refused to live with the complainant. This must be taken as a fixed fact. But this refusal I grant is not enough under the English cases to authorize a separation. In England the refusal of the husband to live with his wife, is a wrong which is redressed by a different suit from this, viz : a suit for *the restitution of conjugal rights*. That suit is unknown to our law ; and hence the 3d sub-division of the 51st section was adopted as a substitute. With us the abandonment of the wife by the husband and his refusal or neglect to provide for her are made the substantial ground for a separation, instead of being as in England, the basis of a suit for the restitution of conjugal rights. But the mere refusal of the husband to live with his wife is not of itself enough to sustain the bill. There must be a refusal or neglect to provide for her. The defendant insists that he was ready and willing to support his wife in his own house—that he requested her to remain there, though he would not cohabit with her ; and that she voluntarily left him and has hitherto refused to return. The fact is true, that the defendant proposed to support her at his house, that she in

fact took her support at his house after they had ceased to cohabit as man and wife, until she left on the 18th Nov. 1842, and that she left on learning the allegations in his bill against her. The question then recurs, was she justified in leaving his house at that time? It must be borne in mind that she then knew of his refusal any longer to live with him, and the cause of such refusal, and that she then knew also of his attempt to debauch her own daughter. These various causes must all be presumed to have had their influence in determining her to leave his house. Accumulated together, were they all sufficient in the aggregate to justify her conduct? I am of opinion that they were. It is asking too much of the wife to require her to reside under the roof of a husband under such accumulated wrongs. She could no longer discharge the duties of a wife to her husband, or a mother to his children. She would be to them an object of scorn as she was to him of hatred and dislike. If then she was justified in leaving him at that time, and if he has refused to provide for her elsewhere, as is admitted in the answer, the case falls within the 3rd sub-division of the 51st section of abandonment by the husband and refusal to provide for her. It surely cannot be necessary to constitute abandonment that the husband should turn his wife out of doors by actual violence. He may be said to abandon her, when he adopts a course of conduct which if not prevented will deprive her of all support. Had he been permitted to obtain against her the decree prayed for in his bill, she would no longer have been entitled to the shelter of his house, or any claim to a support from his estate. He may be said to abandon her, when he renders her residence under his roof intolerable. This may be done by a series of petty annoyances, none of which singly would be sufficient for that purpose.

This question has often arisen in the Common Law

Courts. A husband who turns his wife out of doors, or who by his cruelty or ill treatment obliges her to leave his house, gives her power to pledge his credit for necessities, and he is under a legal obligation to pay the debts which she necessarily incurs ; and he cannot in such a case discharge himself either by a general or particular notice not to trust her. (Leigh N. P. 1097.) What circumstances amount to the cruelty and ill treatment, which justifies her departure and imposes on her husband the obligation to support her were decided in *Alison vs. Chapman*, S. N. P. 272. In that case, his bringing another woman under his roof and thus rendering his house unfit for the residence of his wife, was held sufficient for both purposes. The case of *Horwood vs. Heffer*, 3 Taunton 421, has been in effect overruled in *Houlston vs. Smyth*, 3 Bing. 127. In this latter case, GAZELEE, J. remarks, that he has always considered the law on this subject to be as laid down by Lord Kenyon, that if a man renders his house unfit for a modest woman to continue in it, she is authorized in going away ; see also *Shelford M. & D.* 438, and Leigh N. P. 1097, and the cases cited.

It may be said that the statute does not contemplate a mere *constructive* abandonment, as being sufficient to enable the injured party to invoke the aid of this Court.—Abandonment or desertion of the wife by the husband is not the ground for a divorce in England ; nor is the taking to a separate bed, treated *per se*, as cruelty. Nor can a suit for the restitution of conjugal rights be maintained by the wife against the husband, on his refusal to sleep with her, while she continues to occupy the same house with him—*Orme vs. Orme*, 2 Add. 382. The Courts in England will enforce matrimonial co-habitation, but not matrimonial intercourse. But it does not follow necessarily from these premises, that a bill for a separation will not lie under the 3d subdivision, in cases in which a suit for

a restitution of conjugal rights could not be maintained. Although the two proceedings have something in common, yet there are diversities between them, and hence they are not entirely analogous to each other.

3d. But should there be a doubt whether the facts make out a case of abandonment, still I am of opinion they may, when taken together, be deemed cruelty under the first subdivision of the section, and which I have considered under the first head, or such conduct on the part of the husband towards his wife as may render it unsafe and improper for her to co-habit with him, under the second subdivision. Indeed, these two causes of divorce cannot well be distinguished from each other. The term *soevitia*, as understood in the Ecclesiastical law, obviously embraces the cases falling under both sub-divisions; see *Mason vs. Mason*, 1 Ed. V. Ch. Rep. 292; 2 Kent's Com. 126. Any conduct of the husband which renders it unsafe and improper for the wife to co-habit with him must be cruel and inhuman. On this question of *soevitia* I do not wish to add to what has been said under the first point, only to say, that all the circumstances which have been adverted to under either head, are deemed material in making out the fact of *legal cruelty*.

4th. The 52d section of the statute in question allows the defendant to prove in his justification the ill conduct of the complainant, as a ground for dismissing his bill.—This provision is borrowed from the recrimination, or *compensatio criminum* of the Ecclesiastical law; and is founded on the equitable maxim that a party cannot complain of the breach of contract which he has himself violated. *Shelford Mar. & Div.* 440. Under circumstances of guilt on both sides, the Court will dismiss both parties, and leave them to find sources of mutual forgiveness in the humiliation of mutual guilt. *Ruby vs. Ruby*, 1 Hagg. E. R. 790. In carefully examining the pleadings and

proofs in this case, I discover no instance of ill conduct on the part of the complainant. She seems, during all her trials, to have conducted herself with propriety ; neither provoking ill usage, or retaliating it. She has borne her griefs in silence, and submitted to her fate with uncomplaining resignation. Until after he filed his bill against her, there is no evidence that she even disclosed to her nearest friends, that she had fallen under the displeasure of her husband. Mindful of his honor and his interest, she preferred, even in her disgraced and discarded condition, the shelter of his roof, to the hospitality of friends, which would expose to the world the altered relation she bore to him. A woman loses nothing by forbearance. Humility is to her a more powerful weapon than revenge. She sought not the aid of the Court, till the final hearing of his suit had vindicated her character from reproach, and shewn that his accusations were groundless.

In conclusion, I think the acts complained of, and which have been the subject of remark, are cruel and inhuman within the meaning of those terms, and that the complainant is entitled to a decree, declaring a separation from bed and board between the parties forever, and for a reference to a master to ascertain and report what amount should be allowed to the complainant for her support and maintenance out of the defendant's estate. The complainant must also have her costs against the defendant.

District Court of the United States.

EASTERN DISTRICT OF PENNSYLVANIA.

[Reported for the American Law Journal.*]

THE UNITED STATES *vs.* SAMUEL F. HEWES.

1. A defendant, in execution at the suit of the United States, is not entitled to be discharged from arrest, under the act of Congress of 28th February, 1839, in consequence of having taken the benefit of the insolvent laws of Penn'a.

2. The United States are not bound by an act of Congress, discharging the person of a debtor from imprisonment, unless therein specially named.

On the petition of the defendant to be discharged from imprisonment:

Opinion of HOPKINSON, J. A suit was brought by the United States against the defendant to the last November Sessions, and a judgment rendered against him. Upon this judgment, a writ of *ca. sa.* was issued, the defendant arrested and committed to prison. He has presented his petition, praying to be discharged from imprisonment by virtue of an act of Congress, passed on the 28th day of February, 1839, entitled "An act to abolish imprisonment for debt in certain cases," by which it is enacted, "That no person shall be imprisoned for debt in any State on process issuing out of a court of the U. States, where by the laws of such State, imprisonment for debt has been abolished; and where, by the laws of a State, imprisonment for debt shall be allowed under certain conditions and restrictions, the same conditions and restrictions shall be applicable to the process issuing out of the courts of the United States; and the same proceedings shall be had therein as are adopted in the courts of such States."

*The Editors are indebted for this valuable opinion to F. C. Brightley, Esq., of the Philadelphia bar.

When this act shall be brought into practical operation, some difficulties will occur, which will probably require a more explicit declaration of the intention of the Legislature. At present we have to do with but one. The defendant has exhibited a certificate from the Court of Common Pleas for the city and county of Philadelphia, stating that he had presented his petition to that court for relief as an insolvent debtor ; that he had given notice to his creditors to appear and show cause, if any they had, why he should not receive the benefit of the provisions of the acts of Assembly for the relief of insolvent debtors.— No cause being shown why the prayer of the petitioner should not be granted, he took the oath prescribed by law, made an assignment of all his estate, and was discharged ; “ and it was thereupon ordered by the said court, that the said petitioner shall not at any time thereafter, be liable to imprisonment by reason of any judgment or decree obtained for the payment of money only, or for any debt, damage, costs, sum or sums of money, contracted, accrued, occasioned, owing, or becoming due, before the time of such assignment.” The single question in this case is, whether a debtor of the United States, imprisoned by process issuing from a court of the United States, on a judgment rendered against him by that court, can avail himself of the above discharge to be liberated from imprisonment under the said judgment and process. In other words—are the United States and their rights and remedies against their debtors affected by, and included in, the provisions of the act of Congress of February, 1839 ? This is a question of grave importance to the government of the United States, as it may affect their securities for the public revenue, and their remedies against their various and numerous agents who are receivers of the public money. It therefore demands a very careful examination, and we should not declare, judicially, the in-

tention of the Legislature, until we are fully satisfied of it.

The petitioner rests his right to a discharge on the broad and general terms of the act of Congress, from which no exception is made of a debt due to the United States ; but enacts that *no person* shall be imprisoned for *debt* in any State on process issuing out of a court of the United States, &c. The words, it is said, embrace a debt-
or of the United States, and a debt due to them. If they are to be taken in their large and literal meaning, it is certainly so. But it is contended on the part of the United States :—1. That inasmuch as the United States are not expressly named and included in the act of Congress, they are by implication of law excluded, and that their rights, interests and remedies cannot be affected by general words, unless a clear intention is apparent to include them. 2. That in this case the intention of Congress, that the United States should not be included in the provisions of this statute, may be collected from all the acts of Congress in relation to their debtors, and the whole policy of the government on that subject. The first is purely a question of law, to be decided by the adjudications of courts of law ; for if it be the settled law, it must be presumed that Congress knew it to be so, and had it on their minds in passing the act in question. It will then be my duty only to inquire what is the law, how has it been pronounced by competent tribunals, and to abide by what they have decided. Fortunately, the question has more than once come under the consideration and judgment of our own courts, as well as those of England. I will first refer to the English authorities. In a late elementary work—“ *Dwarris on the Construction of Statutes*”—which seems to have been compiled, at least, with the ordinary care of such works, it is said, “ It is a rule that the King shall not be restrained of a liberty or right he had before, by the general words of an act of parliament, if the King

is not named in the act," 668. In *The King vs. Allen*, 15 East 333, the question arose on the statute of 48 Geo. 3, ch. 74, s. 15, which gave to the sessions an appeal from a conviction by Justices of the Peace, and empowered the sessions to hear and *finally determine* the facts and merits of the case in question between the parties; and enacted, that no *certiorari* should be allowed to set aside the decision of the sessions. It was held, that this did not preclude the crown from removing the conviction, and the order of the sessions quashing the same, by *certiorari*.

This is a very strong case. No words can be more direct and clear to take away the right of removal by *certiorari*, from the determination of the sessions, not only by declaring that it shall be *final*, but by the further express declaration, that no *certiorari* should be allowed; and it is the stronger, as it gives a right of removal to one party, which is denied to the other. In giving his opinion of this case, GROSE, J. says: "The question was, whether the act intended to take from the crown the power of removing the conviction by *certiorari*, for it is clear, that unless the act *has plainly said so*, the power of the crown is not restrained. There are no words expressly taking it away. Then was it the clear intention of the Legislature so to do? for I admit, that if there was such clear intention, the crown would be restrained. This, it is to be observed, is an excise law, passed for the better collection of the revenue, which is open to a different consideration in this respect from ordinary cases." The judge argues that, if in a case affecting the revenue, it was the intention of the Legislature to take the power from the crown, it would have been done by express words. LE BLANC and BAILEY concur in this opinion. A similar decision was given in *The King vs. The Inhabitants of Cumberland*, 6 T. R. 194, in which the construction of the statute of Anne, ch. 18, s. 5, on an indictment for not repairing a bridge was in

question. There are other cases decided on the same principle ; indeed it has not, as far as I know, been questioned in the courts of England. 1 Bl. Com. 261. "The King is not bound by an act of parliament, unless he be named therein by special and particular words. The most general words that can be devised—("any person or persons, bodies politic, or corporate, &c.")—affect not him in the least, if they may tend to restrain or diminish any of his rights or interests. It would be of mischievous consequence to the public. This may be called "*prerogative*"—the prerogative of the crown or king. In England it is attached to the King, because he is the sovereign of the country ; but it is so attached to the King as the sovereign power ; and it belongs to the sovereign power wherever it may reside ; and in that sense we may speak of prerogative without any repugnance to the principles of our constitution, or the spirit of our institutions. It is nothing more than giving certain necessary rights and privileges to the whole community, which are denied to individual citizens, on principles of public policy and expediency for the *general welfare*. Many preferences of this sort, granted to the government, are found in our statutes and no one has thought of repudiating or branding them with any odium as *prerogatives*.* Without a further reference to English authority on this subject, I shall inquire how far the same principle of exemption of the government from the general words of a statute has been adopted or recognized by American Judges. I will begin with an elementary work, but whose author has held the highest judicial stations, and whose learning and accuracy of research are held in the best estimation by every judge and lawyer of our country. In the 1st vol. of *Kent's Commentaries on American Law*, 460—(third edition)—"It is likewise a general rule, in the interpretation of statutes

* See Commonwealth vs. Arrison, 15 Serg. & Rawle 130.

limiting rights and interests, not to construe them to embrace the sovereign power or government, unless the same be expressly named therein, or intended by necessary implication." This is precisely the English rule, and no suggestion is made of a different rule here. On the contrary, the learned commentator, in addition to his English authorities, cites the opinion of Judge Story, as delivered in 4 Mason, 427 ; which is fully to the point. The case there decided was, that the United States may sue in the district court, as endorsee of a promissory note against the maker thereof, although the maker and payee are citizens of the same State, notwithstanding the restriction in the 11th section of the judiciary act, which, the judge says, was not intended to apply to suits brought by the United States; or, if so intended, was repealed by the act of 1805, ch. 253. Now, the words of the judiciary act of 1789, are as general and comprehensive as possible.—“No civil suit shall be brought, &c. Nor shall any district or circuit court have cognizance of *any suit* to recover the contents of a promissory note, or other chose in action, in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents, if no assignment had been made.” There is no exception of the United States or of a suit brought by them as assignee; yet they are not restrained by the general words of the act, which exclude every other suitor from these courts; and why did not these general words include the United States? The reason is given in the opinion of the court. The learned judge who delivered the opinion, admitted that, if the terms of the law are to be understood, without any limitation, they clearly extend to the case before him. After stating some reasons why it should not be presumed that the act was intended to place this restriction on the United States, he says:—“The fair conclusion. IX.—No. 12.

struction of the terms, under such circumstances, is to restrain their generality, to look at the primary and leading intention of the provisions, and to restrain the words to obvious cases. Effect may thus be given to the whole language, without breaking in upon a very important *national policy*." What did the judge consider as the *obvious cases* intended to be provided for by that act? Cases between individual citizens, and not where the U. States was a party. Does not the same reason and observation apply to our case? What was the *national policy* which he thought so important, and not to be broken in upon? To give the United States the use of her own courts, and not to subject her rights and interests to State tribunals. And is not this policy found in the case before us? Did Congress intend to submit the whole system and policy of the U. States for the collection and preservation of their revenue, for holding the responsibility of their agents, officers and debtors, in their own hands, to the various and ever changing provisions and immunities of the insolvent laws of twenty-six States? That the rights and remedies of the United States should be one thing in Pennsylvania, another in New York, another in Maryland, and so on through the whole? Is there any thing like a system—like uniformity, or equal justice, in such state of things? Should we suppose, without a clear and express enactment, that Congress intended to introduce such confusion and uncertainty in the powers of the government over its officers and revenue? In the case cited, the judge puts the opinion of the court on the safe and rational ground that we are not bound to follow, to the whole extent, the meaning of the terms used in an act of Congress; that we may restrain their generality by the circumstances of a particular case, and look to the primary and leading intention of the provision, and give it such effect as will not break in upon an important national policy. In another

er part of this opinion, the judge expressly recognizes the rule I have stated for the construction of statutes. He says:—"It is a general rule in the interpretation of Legislative acts, not to construe them to embrace the sovereign power or government, unless expressly named or included by necessary implication." He cites for this rule, with many other authorities, a case reported in 4 Mass. R. 522, 528, *Staughton vs. Baker*. It will be observed that Chancellor KENT, in his commentaries, adopted the language of Judge STORY. We have another case decided by the same court, and reported in 2 Mason 311, *The United States vs. Hoar*, in which it was determined that neither the general statute of limitations, nor that of Massachusetts, as to executors and administrators, binds the United States in a suit in the circuit court. Judge STORY, delivering the opinion of the court, says:—"It may be laid down as a safe proposition, that no statute of limitations has been held to apply to actions brought by the crown, unless there has been an express provision including it; for it is said that where a statute is general, and thereby any prerogative, right, title, or interest, is divested or taken from the King, in such case the King shall not be bound unless the statute is made by express words to extend to him." After giving the reason of the rule, which excepts the crown from the operation of statutes of limitation, which he says will be found in the great public policy of preserving the public rights, revenues, and property, from injury and loss by the negligence of public officers, he adds: "and though this is sometimes called a prerogative right, it is in fact, nothing more than a reservation or exception, introduced for the public benefit, and equally applicable to all governments." He also refers to the case reported in 4 Mass. R. 528.

These have been the doctrines adopted and recognized by a Circuit Court of the United States. The Supreme

Court of New York has also recognized them. In 4 Cow. 143, *The People vs. Rossiter*, we have not to deal with the King and his prerogatives. The decision, as given in the syllabus of the case is: "that a discharge under the act to abolish imprisonment for debt, does not extend to a debt due to the people of the State, nor *seem*, does any insolvent or bankrupt law, unless the people are named in it." The report is very short, and the decision of the question *seems* not to have been attended with any doubt or difficulty. Judgment was obtained against an attorney of the court, for clerk's fees due to the plaintiff, upon which he was imprisoned under a *ca. sa.* after he had obtained his discharge under the act to abolish imprisonment for debt in certain cases. This is precisely the title of the act of Congress in question. The counsel for the prisoner moved for his discharge, on the broad and unqualified words of the act that, "the debtor shall be exempt from imprisonment for or by reason of *any debt or debts* due at the time of making the assignment." There was no exception, he said, of debts due to the people, and none should be implied. The Attorney General replied, that general words did not bind the people; they are not named; and that the rule is the same as to them, which prevails in England, as to the King. By the Court: "The motion must be denied. The people are not bound by any act of this kind, unless they are named in it. The rule is the same as in England. The King is not bound by a bankrupt law unless named, and the people are the king for the purposes of this rule." Will it not be singular if the United States shall be bound by an insolvent law of New York, when the State herself is not so—both depending on general words in a statute? Can she claim the benefit of a rule of construction against her debtors, which is denied to the United States?

The reports of the Supreme Court of Pennsylvania fur-

nish a decision asserting the same principles. In *1 Watts 54*, it was decided, after a careful examination by the court, of cases in the courts of the United States, that the State is exempt from the operation of the acts for the revival of judgments to continue the lien on real estates.—There is in those acts no exception in favor of the Commonwealth, and the terms are broad enough to include all and any judgments.*

That the United States have not heretofore been affected or bound by a discharge of their debts under a State insolvent law, was settled by the Supreme Court in the case of *the United States vs. Wilson*, 8 Wheat. 253: and so the law now remains, unless it has been changed by the act of Congress of February, 1839, now under consideration.

The principles maintained in the cases I have referred to, have not been contradicted or impeached by any authority cited at the bar; nor have I found any in my investigation. I shall leave them to rest on the opinions of learned courts and judges in our own country, as well as in England, and supported also, as I think, by their own strength and good reason.

Putting aside the rule of construction, which excepts the sovereign power from the operation of such laws, unless expressly named, as a rule of law, binding in courts, the same result may be reached by the ordinary doctrine which refers to the intention of the Legislature for the interpretation of their acts.† The learned judge, to whose opinions and reasonings I always refer with confidence, says :—(2 Mason, 314,) “Independently of any doctrine founded on the notion of prerogative, the same construc-

* The same principle is recognized by the Court of Errors and Appeals of the State of New Jersey, in the case of *Van Kleck vs. O'Hanlon*, 7 Penn. Law Journal 28. See also *The People vs. Gilbert*, 18 John. 227; *Regina vs. Tutchin*, 2 Lord Raym. 1066, S. C. 1 Salk. 51; *Brown's Legal Maximo*, 27; 11 Co. 666, 746.

† See *Commonwealth vs. Burrell*, 7 Penn. St. Rep. 34.

tion of statutes of this sort ought to prevail, founded upon Legislative intention ; where the government is not expressly, or by necessary implication included, it ought to be clear from the nature of the mischiefs to be redressed, or the language used, that the government itself was in contemplation of the Legislature, before a court of law would be authorized to put such a construction upon any statute. In general, acts of the Legislature are meant to regulate and direct the acts and rights of citizens, and in most cases, the reasoning applicable to them applies with very different and often contrary force to the government itself. It appears to me, therefore, to be a safe rule, founded on the principles of common law, that the general words of a statute ought not to include the government, or affect its rights, unless that construction be *clear and indisputable* upon the text of the act."

There is another principle or rule in the construction of statutes, so well established by authority, and so entirely reasonable in itself, that it may be assumed to be unquestionable in itself. It is this: that not only one point of a statute may be properly called in to help the construction of another point, but that it will be inferred or presumed that a number of statutes relating to the same subject were intended to be governed by one spirit and policy to be consistent and harmonious in their several parts and provisions. Dwarries 699. The same author adds, as the consequence of this intendment, that "it is an established rule that all acts *in pari materia* are to be taken together, as if they were one law, and they are directed to be compared in the construction of statutes, because they are considered as framed upon one system and having one object in view." This doctrine is affirmed by 4 T. R. 447, 450; 5 T. R. 417; Doug. 30. In this last case, Lord Mansfield says, "all acts *in pari materia* are to be taken togeth-

er, as if they were one act." In 3 Burr. 1607, he says, "they are to be considered as *one system*."*

What have been the spirit and policy—the system adopted by the government of the United States in relation to its debtors, running through all the acts of Congress on that subject?

1. That the rights, interests, and remedies of the United States shall not be impaired or affected by the insolvent laws of any State; that they have never allowed the courts of any State to interfere between them and their debtors, or to prescribe any terms, conditions, or restrictions upon their rights and remedies for recovering and securing their debts.

2. That they have never allowed even their own courts, constituted by their own authority, to discharge one of their debtors from imprisonment under a judgment and execution at their suit. The general bankrupt act, and the law of Congress for the relief of insolvent debtors, gave no such power to the commissioners in the one case and the courts in the other.

3. That for all such questions, for all such indulgences, a tribunal was created, which was the government itself; and this power and discretion was lodged with the President in certain cases, and with the Secretary of the Treasury in certain other cases. To these high and responsible officers the whole subject was committed; the examination of the circumstances of each case was imposed upon them, and the decision upon it vested in them, upon such terms and conditions as they should think proper to exact. 1 Stor. Laws 750 § 62, the bankrupt act; 1 Stor. 715, act for the relief of persons imprisoned for debt; 3 Stor. 1652, act of March, 1817, application to be made to the President; 1 Stor. 506, act of June 6, 1798, applica-

*See also to the same point *Rex. v. Lordale*, 1 Burr. 447; and *The Mayor vs. Davis*, 6 Watts & Serg. 269.

tion to be made to the Secretary of the Treasury ; 4 Stor. 2236, appointing Commissioners to report to the Secretary ; 3 Stor. 1997, § 38, of post-office act. It is true, that in the bankrupt and insolvent acts there is an express exception of the United States,* but we cannot presume from this that Congress intended to reverse or abandon the rule of construction which would have excepted them. It was the exercise of that abundant caution often found in statutes. Can we believe it was the intention of Congress, by the act of 1839, to abandon all this system, to change all this financial policy, to repeal the distinction heretofore made between ordinary debtors of the United States and " persons indebted as the principal in an official bond, or for public money received by him and not paid over or accounted for, or for any fine, forfeiture, or penalty incurred by the violation of any law of the United States ? " Did Congress intend to give to the State courts a power over the rights and interests, over the revenue of the government, which had been denied and is yet denied to its own courts, which had been carefully kept in its own hands ? Are collectors of the customs, and debtors in duty bonds and their sureties, post-masters, and other receivers of public moneys, to be thus discharged from the liability of their persons for such debts ? Are persons imprisoned for fines, penalties and forfeitures to be liberated by order of a State court acting under a State insolvent law ? Are such cases to be submitted to the judgment and discretion of every county court in six and twenty States, with practically no opportunity afforded to the United States to attend to their interests—to detect fraud or concealed property—to oppose the discharge in any way, or for any reason ? It is no extravagant case to suppose that an absconding defaulter for immense sums might return

*By the bankrupt act of 19th August, 1841, sect. 5, Pamph. Laws, 12, debts due the United States were directed to be first paid out of the bankrupt's estate.

with full pockets, apply to some obscure county court in a distant State, and pass himself through the forms, (for they are little more,) of an insolvent law, and be afterwards secure in the enjoyment of his concealed plunder, which the searching power of the United States might have forced from him. Are these extensive and vital changes in the system and policy of the United States to be effected by general words, having no express reference to them or to the United States? Assuredly, such consequences would not have been left to a question of construction. The intention would have been declared in express and unequivocal language. What will become of the right always claimed of a priority or preference of payment from an insolvent estate? There is no provision for this in the insolvent laws of Pennsylvania, nor do I presume it will be found in any insolvent act. But the law of 1839 declares that, "where, by the laws of a State imprisonment for debt shall be allowed under certain conditions and restrictions, the same conditions and restrictions shall be applicable to the process issuing out of the courts of the United States." What the effect of these provisions will be upon the priority of the United States, I am not now called upon to say; but it would seem that if the same conditions are to be imposed, no other or additional conditions could be required of the debtor. All these difficulties, and many more, will be avoided, by adopting in the construction of this statute the reasoning of Judge STORY already referred to, "that, in general, acts of the Legislature are meant to regulate and direct the acts and rights of citizens, and in most cases the reasoning applicable to them applies with very different, and often contradictory force to the government," and that "the general words of a statute ought not to include the government, or affect its rights, unless that construction be clear and indisputable upon the text of the act."

Other difficulties and inconveniences will arise by extending the provisions of this act to the United States.—The provisions of the insolvent laws of the different States, the conditions and restrictions they impose upon the debtor, are various and entirely different from each other. The United States, then, as well as its debtors, will have no uniform rule of responsibility. There will be no harmony in the relations between the government and its debtor. The rights and remedies will be one thing in one State, another thing in another, and so throughout the whole twenty-six States. Could such confusion have been intended—such an entire destruction of every thing that can be called a system—of all pretence to one policy? Again, the act of Pennsylvania, and I presume every other insolvent act, requires a notice of some kind, either personal or by public advertisement, to be given to the creditors of the petitioner. To whom is this notice to be given for the United States? Who is bound or authorized to receive it for them? Is it the President, or the Secretary of the Treasury, who have heretofore had the superintendence of the debtors and debts of the United States, or to the District Attorney? I have seen no authority given to either of them to accept any such notice, or to bind the United States by appearing in pursuance of it. There are other details in the insolvent laws of Pennsylvania, which it will be difficult to apply to the United States. In the argument of this case, the District Attorney referred to the act of Congress of March, 1797, by which it is enacted that all writs of execution upon any judgment obtained for the use of the United States in any court of the United States, may run, and shall be executed in any other State, but shall be issued from, and made returnable to, the court where the judgment was obtained. Must the discharge of which the debtor may avail himself against this execution, be under the insolvent law of the State in

which he is arrested, or will a discharge by the court of any State be sufficient for his liberation? The words of the act would seem to refer only to the laws of the State from which the process issued; but it is by no means clear what construction might be put upon it under the notion of extending it in *favor of liberty*.

I have given this case a careful examination and extended the explanation of my views of it beyond what may be thought necessary, because I am so unfortunate as to differ in my construction of this act of Congress from the learned and estimable Judge of the Southern District of New York. It would have been very gratifying to me if I could have come to the same result he has upon this question. It must, however, be remembered that the point was not argued or made a question by the District Attorney, in the case decided in New York.

The attention of the court was drawn to another part of the case, and the application of the act to the debtor of the United States, although mooted, was not argued, as the District Attorney had no doubt that the provisions of the act did include the United States. Certainly the opinion of this learned lawyer and respectable gentleman ought to make, and does make, me more diffident of my own. I am bound, however, to declare my opinion according to my own convictions of the true construction of the act of Congress in question—and that is, that it does not include in its provisions the United States, or the debtors who may be imprisoned on a judgment obtained at their suit in a court of the United States.

The prayer of the petitioner is denied.

Supreme Court of Pennsylvania--Western District.

[Reported for the American Law Journal by JAMES S. CRAFT, Esq.]

ABSTRACTS OF DECISIONS.

PITTSBURG, SEPT. TERM, 1849.

Prestley vs. Ross. BELL, J. The amount actually passed upon by a Justice of the Peace, or by Referees, under a rule entered before him, regulates the right of appeal. This rule is confined however to the plaintiff, unless the defendant has successfully preferred in his defence evidence of a cause of action as a set off.

Murray vs. Henni. ROGERS, J. Where it does not appear on the face of an award specially, that the arbitrators refused to allow a set off, it is not the subject of review.

McCullough's heirs. vs. Gilmore. COULTER, J. After general introductory words, indicative of the intent of the testator to dispose of all his property, a devise "*that it fall into the possession of my brother William,*" who is not to leave the same to any but the legitimate heirs of his father's family at his disease, construed to carry a fee simple.

Penn'a for use of Head, adm'r. of James Taylor vs. Ebby, adm'r. of Robert Taylor. ROGERS, J. On a joint acceptance by three heirs of an estate valued under writ of partition &c., in the Orphans' Court, the recognizances may be several, and on their several parts, and severally sued.

The money secured by recognizance in the Orphans' Court is personalty. The sci. fa. on such recognizance may be against the surviving cognizor with notice to the administrator, &c. of those deceased.

Scire facias in the District Court of Common Pleas will be sustained on such recognizance in the Orphans' Court, it being really but an action of debt.

In such sci. fa. by the administrator, it is not a good defence that the amount of the recognizance had been paid to those entitled to recover it, as heirs at law of the cognizee, dying in her minority without issue and not indebted.

Adm'rs of Morton vs. Morton. COULTER, J. An affidavit is necessary to support an appeal from an award of arbitrators by administrators.

Appeal of Chambers, adm'r. of Robb, dec'd. BELL, J. After the

settlement and confirmation of a final administration account, not appealed from, and the lapse of the time within which a petition of review could be preferred, an administrator was held liable for the amount of a bond held by himself against his intestate—she being but surety therein—and the estate of the principal debtor sufficiently responsible to such administrator had he pursued the claim with due diligence, although he had received credit in said account. Thus held, on the ground that such want of diligence occurred after the settlement of the account.

In the estate of McClaren, a minor. COULTER, J. The Supreme Court will not reverse the decree of the Orphans' Court refusing to sell a minor's estate on an auditor's report in favor of such sale. Reference of the propriety of such sale to an auditor commended.

Steele & Co. vs. Campbell. ROGERS, J. The judgment on foreign attachment which the court refused to carry into effect in *Smith vs. Steele*, 7 W. & S. 447, cannot be set up in bar, or as a merger of the original cause of action or as any kind of defence thereto.

King vs. Holmes. ROGERS, J. The holder of a bill may deliver it at any time of the day on which it is due to a notary for demand, and on refusal of payment to give notice.

A demand made of the acceptor, in the street, is not good. It should be at the acceptor's place of business, but if on the notary's way there, he meets the acceptor, who says he will pay *only* in a check on a broker, (viz : inferior currency,) any further demand is waived thereby.

A protest between four and half after four o'clock in Pittsburg, is not too early—although there is a practice there among brokers to wait until five, there is no evidence establishing such practice as a custom.

A tender in gold made by an acceptor of the bill to its holder, after it had been handed to a notary (being due) for protest, though within the business hours of brokers, (the holder himself being one) is too late to save protest or notarial fees.

McClure vs. McClure. COULTER, J. In an action for the purchase money of the sale of a legatees claim to an estate, it is not competent for the vendee to shew the existence of judgments or other debts due by such estate, diminishing the value of such legatees share, for the purpose of obtaining an abatement of the price such vendee contracted to pay.

County of Allegheny vs. Gibson. BELL, J. The county of Allegheny and others in which the Court is authorized to appoint a surveyor as a road viewer, is not responsible for the extra value or price of such surveyor's services, beyond others.

McCullough vs. School Directors. Fourth Ward Pittsburg. The Directors of a school district may sell the real estate purchased by them for school purposes, and buy anew at their discretion.

Calhoun vs. Jester. GIBSON, C. J. Devise :—" I will give and bequeath unto my son John, one dollar, and I leave unto John's children my plantation with all my dues and other accounts, after paying all my just debts and other expenses ; also, by paying the several legacies herein mentioned, said plantation to come into their possession, or into the hands of my executor for their benefit at my decease : Providing that my son John have the privilege of living on the place with his children during his life ; the end of the place on which my dwelling house stands to be rented out to pay all my just debts and the legacies mentioned," gives John not an estate on which creditors can levy, but a license ; nor is there any remainder vested or contingent, and the land is given not to John with a limitation over to his children, but to them immediately, not subject to open and let in children born after testator's death.

Mellon vs. Campbell. COULTER, J. The defendant is a *levari facias* is not accountable for a commission to the plaintiff's attorney for collecting rent of the property taken in extension, nor is the defendant's receipt of money, after an account containing the charge of such commissions was rendered, an admission of the correctness of such charge. The attorney receiving more than the debt is accountable to the defendant and not to his client, the plaintiff.

The rule for calculating whether property will extend or not, in some counties, is to add seventeen per cent. interest to the liens and all costs for the nett annual rent beyond all repairs and taxes, payable at the commencement of the year. If this will pay the debt and interest of all the liens with the accruing interest and costs, the land is extended.

Ausbauch vs. Gearhart. Per. Cur. An endorsement of the plaintiff's name, without date, on a note, is presumed made at its date, and the endorser held liable as an original promisor and not as a guarantor. The consideration for the note being a consideration for the indorsement.

Hutchison vs. Potter. BURNSIDE, J. On certiorari to two Justices to remove inquest on complaint by landlord against tenant: *Held*, that a clause in a lease agreeing to surrender possession, "*without further notice*," will dispense with the three months notice required to sustain the proceeding ; but if in the absence of such a notice, such agreement of waiver is not found by the inquest, its finding will be quashed.

Miller vs. Specht. GIBSON, C. J. B. the assignee of a lease of ground for a term of ten years, orally agreed to assign it on a day appointed to A. (B's. tenant retaining possession in the meantime, and the accruing rent going to the assignee.) A. paid part of the money, (the price of the bargain,) and transferred to S. who took A's. place and paid the residue of the purchase money two months after the day appointed, and at this time A. went into possession as the tenant of S.

The interest of A. was not at any time such an equity as his creditors could take in execution, being void under the statute of fraud, and though some purchase money was paid, for the want of possession, it was never complete as an interest in real estate.

Marshal vs. Marshal. COULTER, J. When the alteration in a testator's circumstances is such as to render it impossible to execute any part of his will, as in *Cooper vs. Cooper*, 4 Barr 887, it will be considered as entirely revoked, but when it can be partially executed, the revocation is only pro tanto viz : as to that part which cannot be carried into effect.

Kirkpatrick vs. Burnside, et al. BELL, J. B. having agreed in writing to purchase a tract of land and paid \$2,000 on the article, and becoming embarrassed assigned the claim to A. to secure him in a debt of \$100, and to reimburse K. for \$1000 money paid for B. as surety of the latter. A. was to prosecute the claim by obtaining a title to the land subject to the purchase money remaining due, or to recover back the portion of the purchase money advanced. On the faith of this arrangement K. abstained from pressing B. until he afterwards became a bankrupt, and it is now charged that confederating with A., and the vendor of the land, a deed of the land had been made fraudulently to the son of B., crediting him with the residue of the money originally paid by B., (after deducting the amount due to A.) and that said B's son has obtained possession and title of said land for the use of his father and in fraud of the arrangement made to secure K. the complainant. The bill prays from all the respondents a discovery, and that the land be charged with the payment of the money due the complainant K. *Decided*—That this is such a continuing trust as is within the jurisdiction of a Court of Equity in Pennsylvania. The claim said vendee had he might assign directly, or through the intervention of another. In the latter case, the transferee would be the trustee and the party to be benefited by the assignment, *the cestui que trust*. Such a trust may arise from a formal assignment by deed of property in possession, or of choses in action in general trust for creditors, or be the subject of a parol arrangement, which though voluntary a Court of Chancery will act upon if the trust be perfectly declared. (18 Ves. 140, 12 Ves. 39, &c.) The remedy in England is concurrent. Whether or not a Court in Pennsylvania will assume jurisdiction in Equity when the action for money had and received, will be an adequate remedy; they will do so if an account is incidentally requisite. But when the trustee has duties to perform, other than disbursement, a technical and continuing trust is presented which can only be satisfactorily pursued in Equity, of which this case affords a pregnant example. The trustee having proceeded to enforce specific execution of the contract with the vendee, Equity will pursue the land, notwithstanding the conversion of the fund from personal to real estate. 2 W. C. C. R. 441, 3 W. & S. 280.

Frenay vs. Miller. ROEAS, J. The plan of a town laid out for fifty years, shown to have been in the Recorder's office for but six years, is not evidence when offered as substantive proof bearing on the title, but might be received as a mere diagram.

Ryan vs. Ryan. ROEAS, J. Devise:—J. K. is to have 70 acres, &c. My desire is that W. K. have \$5, [and so as to several others,] and T. K. to have \$100, and J. K. to pay this money. Mrs. K. (testator's wife,) to have the management of both my real and personal property for her life, &c; carries a fee simple to J. K.

Klinkner vs. School Directors of M'Keesport. BURNSIDE, J. A dedication of lots for school purposes, or public grounds for markets, churches and grave yards, by marking its use on the plan of a town as laid out by the proprietor, makes them appurtenant to other lots in the town, and such dedication cannot be questioned by intruders, although no trustee was ever named.

Commonwealth vs. Holmes & Son. COULTER, J. Those who purchase with their own funds, notes or bonds due, or payable at a future day, at such discount as may be agreed upon, and hold them as investments, or collect them when due, are not "Bill Brokers" within the 3d sec. of the act of 1841, nor subject to the penalty for making such purchases without license. "Bill brokers," within said section are those who buy and also sell such bills, notes, &c., as the agents or factors of others.

Donahoe vs. Scott. BURNSIDE, J. On the trial of sci. fa. sur Mechanic's lien, if the defendant owner is summoned, and the contractor is not, the jury may be sworn against the owner only.

An attorney at law may sign the owner's name to the original lien filed.

If the date of the time of doing the work be omitted in the lien filed, it will be presumed to have been done when the work was completed and the quantity ascertained.

A general lien may be filed against several buildings, and the amount due from each apportioned.

Logan vs. McGinnis. ROEAS, J. The subscribing witnesses to a will may testify their opinions of the sanity of a testator—other witnesses than those subscribing must testify to facts from which the court and jury may draw their opinion of testator's sanity. 3 Mass. 330.

A devise of all the testator's estate to his step-son, upon condition that such son would legally bind himself to support and maintain said testator and his wife during their natural life, is not contrary to the policy of the law, and such condition is complied with by a cotemporaneous obligation of the devisee to support and maintain testator and his wife agreeably to the conditions of the will.

Wagner vs. Baker. BELL, J. An Alderman or Justice is competent

to administer the oath to an affidavit under the 2nd § of the act of 12th July, 1842, abolishing imprisonment for debt, or any other oath or affirmation required to support any collateral or interlocutory step found necessary in a cause pending in the common law or Orphans' Court.

If perjury be alleged to have been committed under an oath, administered under the act above recited, it is immaterial whether a warrant of arrest was issued on it or not—if the charge of perjury sufficiently related to such affidavit.

Arken's heirs vs. T. B. Young, &c. ROGERS, J. In an ejectment by the heirs for premises which had been made the subject of petition in the Orphans' Court by a vendee, now defendant, to prove a decedent's contract, whereof notice had been given to the executors of decedent. The petition, proofs, depositions and decree, and record, are evidence, though the executors made no deed in pursuance of the decree.

And in such an ejectment the receipt of the devisee of a life estate in the premises for ground rent accruing during her life, is evidence for the vendee to shew his performance of his contract.

The statute of limitations will run against the interest of the lessor in an alleged perpetual lease of which the lessee has regularly paid the ground rent.

(*Madison Circuit, N. Y.*)

HAMILTON AND DEANSVILLE PLANK ROAD Co. vs. RICE.

ASSIGNOR OF CHOSE IN ACTION A COMPETENT WITNESS, THOUGH
ASSIGNMENT MADE TO MAKE HIM A WITNESS.

An assignor of a thing in action is a competent witness in New York, though it appears that the assignment was made for the purpose of making him a witness.

The question adjudicated upon sufficiently appears in the opinion of the learned Judge.

Nye, for plaintiff. *Eldridge* for defendant.

GRIDLEY, J. The objection is made upon the ground
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that the witness is an *assignor of a thing in action, assigned for the purpose of making him a witness*, and not on the ground that the witness is still interested in the event of the suit. I think that a careful reading of the 351st and 352d sections of the Code will show the objections to be untenable. The 352d section does not declare that the assignor of a thing in action, assigned for the purpose of making him a witness, shall be *incompetent* as a witness, but that the 351st section shall not apply to such assignor. Now, the 351st section simply enacts, that no person shall be excluded from being a witness by *reason of his interest in the event of the action*. The conclusion is, therefore, that if the assignor who has assigned to become a witness, still remains interested in the event of the suit, he shall continue to be incompetent, notwithstanding the provisions of the 351st section. If that section should be applied to such an assignor, he might be a witness though he *remained interested* in the event of the suit, as in many cases he does, notwithstanding the assignment. The Code intended to exclude such assignors, if *interested*, though *interest*, as a general rule, would not render a witness incompetent.

Such an assignor, if divested of his legal interest, would have been competent under the old law, and it is the policy of the Code to *enlarge and not contract* the rule of competency as applied to witnesses. The witness is competent.

[7 N. Y. Leg. Ob. 139.

Abstracts of Recent Decisions.

Supreme Court of Indiana, at Indianapolis, May T., 1849.

Corning vs. Strong. SMITH, J.—Held, 1. That the receipt of a note

for a precedent debt is not a payment, and an agent sent to collect such debt has no authority to give a discharge upon the receipt of a note or bill.

2. That an agent, under a general authority to collect an account sent to him for that purpose, and to receipt therefor, is only authorized to receive payment in money, and cannot by taking the note of the debtor payable at a future day, divest the creditor of his right to sue upon the original debt.

3. That an agent with limited powers must conform strictly to such powers, or his principal will not be bound; accordingly it has been held by this Court, in *Miller vs. Edmonston*, 6 Blackf. 291, that when notes are placed in the hands of an attorney at law for collection, the attorney has no power to cancel them upon the receipt of new notes given by the debtor, and that the owners are not thereby barred from bringing suits on the original notes against the makers.

Heirs of Daniel J. T aylor vs. Parker. SMITH, J.—It is error to render a decree against infants without proof, notwithstanding the admissions of their guardians *ad litem*.

Bayse, adm'r. &c. vs. Daniel. SMITH, J.—A deed must be founded upon a valuable consideration, and must also be *bona fide*, to be valid as against existing creditors.

Brackenridge vs. Baltzell. BLACKFORD, J.—The exception in our statute of limitations which is of running accounts between merchant and merchant, was not intended to be limited to actions of account, or for not accounting, or to cases in which such actions will lie.

The terms "running accounts" in our statute, mean mutual accounts and demands between the parties, which accounts remain open and unsettled. Whenever, therefore, the accounts and demands are of that description, and are between merchant and merchant, the case (whether an action of account or for not accounting would lie or not.) must be considered as not limited by the statute.

Johnson vs. Brandis. SMITH, J.—This was a bill in Chancery by a judgment creditor to set aside a fraudulent sale of lands made during the pendency of his suit and prior to the judgment. The complainant proved admissions of the purchaser to the effect that he was aware of the pendency of the complainant's suit against his grantor; that the damages that would probably be recovered would amount to more than the value of all the defendant's property; that the defendant had been endeavoring to dispose of his property to other persons, who had refused to receive it, because, under such circumstances, the sale would be deemed fraudulent; and that the effect of the sale was to deprive the complainant of the means of making her judgment available. It was also proved that the

purchaser in answer to an inquiry whether he was safe in purchasing the property, replied that he was; that he had taken legal counsel on the subject, and it was all right: *Held*, that under these circumstances, the purchaser was chargeable with notice of the intended fraud, and that the property was liable to the judgment. *Reversed*, with directions to the Circuit Court to render a decree in accordance with the opinion of this Court.

Clark vs. Snelling. BLACKFORD, J. In an action on a promissory note the defendant pleaded *inter alia*, that the note sued on was given in consideration of the sale, by the plaintiffs, to one of the defendants, of a certain tract of land; that on the day the note was given, the plaintiff executed to said defendant a deed for the land with covenants against incumbrances, &c.; that the plaintiff's title was derived by will from his father, who, at the time of his death was indebted in the sum of \$4,000, for the recovery of which a suit was then pending against the personal representative, &c.: *Held*, that the plea was insufficient. It does not show an eviction, in consequence of the debt, nor that the defendants had paid it: the purchaser at most, according to his plea, has a claim for nominal damages for the breach complained of, and such claim is no defence to a suit for the price of the land. 5 Blackf. 100, 541; 7 do. 55; 8 do. 142.

A covenant by the holder of a promissory note, with the maker, never to bring suit on the note, will be a bar to such suit; but a covenant to forbear for a limited time after the same becomes due, is no bar to a suit brought on the note before the expiration of the given time. 5 Blackf. 125; 6 do. 282; 3 Meeson and Welby, 210.

Murphy vs. Stout. BLACKFORD, J.—*Held*: That where the general issue and a plea of justification have been pleaded in an action of slander, the plea of justification is not admissible as evidence for the plaintiff, under the general issue, to prove the speaking of the words; nor is it admissible to aggravate the damages, in the absence of reason, on the part of the defendant, to believe the plea to be true.

Lorance vs. The State. SMITH, J.—*Held*: That the discharge of the sureties on a forfeited recognizance in a criminal case, upon the surrender by them of their principal, does not, under our statutes, operate to discharge the principal.

Murphy vs. The State. BLACKFORD, J.—Indictment for retailing spirituous liquors by a less quantity than a quart, without license. Plea, not guilty. Testimony as follows: In Decatur county, within a year before the finding of the indictment, the defendant kept whiskey for sale by the quart, (having no license to retail,) and the witness was in the frequent habit of taking a pint bottle and going to the defendant's for liquor.—

The witness always bought a quart at a time, but had it drawn in a pint bottle, and after he had used that, he would go back for the other pint.—Then, the next time he went, he would buy another quart, and take it away, a pint at a time, and so repeated his purchases. Sometimes he paid for the quart when he got the first pint, and sometimes he would not pay until he got the second pint. But he always paid ten cents at a time, that being the price of a quart: *Held*, That as the evidence showed that a quart was not at any one time drawn from the vessel containing the liquor, there was no actual sale, at any one time, of a quart of whiskey.

To render a sale of goods valid, the specific, individual goods must be agreed on by the parties. It is not enough that they are so far ascertained, that they are to be taken from some specified larger stock, because there still remains something to be done to designate the portion sold, which portion, before the sale can be complete, must be separated from the mass.

Dunn & Watts vs. Hall. SMITH, J.—*Held*, 1. That if the owner and publisher of a newspaper chooses to leave his home, and place his paper in charge of another, he is responsible for any libelous matter published by the person thus constituted his agent, no matter what private instructions he may have given him. So, if one of two joint owners of a newspaper permit the other, or a third person to edit it, he is responsible for the conduct of the person so conducting the paper.

2. That though a libelous publication is made against the expressed disapprobation of one of the owners of a newspaper, yet he is responsible if by the exercise of due and proper diligence he could have prevented the publication; and if he sees fit to entrust the publication of his paper to others, he must be held responsible for the conduct of those he employs, even if his agent makes a publication which he had forbidden.

3. That malice in law is a wrongful act done intentionally, without legal justification or excuse, and, in ordinary actions for slander, malice in law is sufficient, and is to be inferred from the publication of the slanderous matter without such justification or excuse.

4. That the legal presumption of malice may be rebutted by evidence of facts which would afford a legal excuse for the publication, as where the slanderous matter was published by the employees of a printing office, with the materials of the proprietor, but which he could not by care and diligence in the transaction of his business have prevented; and it would be a question for the jury whether such facts existed; but what facts when proved would amount to such legal excuse, would be a question of law.

Graces vs. The State. SMITH, J.—The plaintiffs in error were indicted

ed and fined for a riot growing out of the arrest by them, under a justice's warrant, of a fugitive slave: *Held*, on the authority of *Prigg vs. The Commonwealth of Pennsylvania*, in the Supreme Court of the United States:

1. That the power of legislation in respect to fugitives from labor, is exclusively in the National Legislature; and when Congress has exclusive power over a subject, it is not competent for State legislation to add to the provisions of Congress on that subject.

2. That by the Act of February 12, 1793, Congress has provided for the exercise of the power which the Constitution has given it over this class of persons.

3. That said Act is clearly constitutional in all its leading provisions; and although a difference of opinion has been expressed as to whether State magistrates were bound to act under it, no doubt is entertained that they may, if they choose, exercise such authority, unless prohibited by State legislation.

That said Act of Congress is not repugnant to the ordinance of 1787, as to the States formed out of the territory north-west of the Ohio river. See *Jones vs. Vanzant*, 5 Howard, 215.

Doe ex dem. Hutchinson vs. Horn. SMITH, J.—In 1837, one Christopher Jourdan, who had a wife living in Virginia, married Matilda Beard, in Allen county, Indiana, she having no knowledge of his former marriage. In 1841, suit was brought against Jourdan on a debt contracted in Virginia, and on the next day he executed a deed conveying to Matilda and her two children by him, certain real estate in controversy in this suit, to compensate her for the injury he had inflicted upon her. Immediately after the execution of the deed, Jourdan left the country. Judgment was rendered against him, in the suit previously commenced, and the lands above named were sold on an execution issued on said judgment:

Held: That the consideration of the deed to Matilda and her children was a valuable and adequate one, and valid, although by it Jourdan intended to defraud his creditor, Matilda not being privy to the intended fraud.

The title of a purchaser of lands at a sheriff's sale, relates back to the date of the judgment, and a demise laid anterior to the date of the sheriff's deed, cannot be said to be laid before the commencement of the purchaser's title.

[West. Legal Obs. 243.]

*Supreme Court of Illinois, for the Third Grand Division,
at Ottawa, June Term, 1849.*

Ewins vs. Fisher.—A bill of exceptions should be reduced to form and signed during the term in which the cause is tried, except in cases where counsel consent, or the Judge by an entry on the record directs, that it may be prepared in vacation and signed *nunc pro tunc*. In all cases, it should appear on its face to have been taken and signed at the trial.—Where counsel consent that the bill of exceptions may be settled out of term, the better practice is to preserve the evidence of the agreement by filing of a written stipulation, or by an entry on the records of the Court.

Makepeace vs. Moore.—An administrator may assign a promissory note made payable to his intestate so as to vest the legal interest in the assignee.

An administrator succeeds to the legal title to the personal estate of his intestate, and the title takes effect by relation from the death of the latter.

As a general principle, an administrator has the power to dispose of the personal estate of his intestate, and it cannot be followed into the hands of the alienee. There are, however, exceptions to this rule, as where the purchaser knows or has reason to believe that the sale is made with a design to misapply the funds; or where property is transferred by the administrator in payment of a private debt; or where it is sold for a grossly inadequate price. Opinion by TREAT, C. J.

[1 West. Leg. Obs. 252.]

BENJAMIN GODDARD, *et ux.*, appellants, *v.* BENJAMIN F. HART, *et ux.*,
appellees.

APPEAL FROM STEPHESON, (ILLINOIS.)

On the trial of a joint action of trespass against a husband and wife for an assault, the Court admitted evidence of an assault by the husband alone, and refused to instruct the jury that the plaintiff could not recover damages for such separate assault: *Held.*—that the decisions were clearly erroneous.

Trespass for an assault, brought by the appellees against the appellants in the Stephenson Circuit Court and heard before the Hon. Thomas C. Browne, and a jury at the

August term, 1846, when a verdict was rendered in favor of the plaintiffs below for the sum of \$534,16 damages.

All the facts necessary to the determination of this case are concisely stated by the Court in the Opinion.

S. T. Logan, for the Appellants.

O. Peters, for the Appellees.

The Opinion of the Court was delivered by

TREAT, C. J. This was a joint action against husband and wife for an assault. On the trial, the Court admitted evidence of an assault by the husband, in the commission of which the wife did not in any manner participate ; and so refused to instruct the jury, that the plaintiffs could not recover damages for the separate assault by the husband. These decisions were clearly erroneous. The recovery in this case could not be pleaded in bar of an action against the husband for the separate assault.

The judgment of the Circuit Court is reversed with costs ; and the cause is remanded for further proceedings.

Judgment reversed.

[From the New York Legal Observer.]

English Decisions.

BILL OF EXCHANGE—ACCEPTANCE BY MARRIED WOMAN FOR HUSBAND IN HER OWN NAME.

The question in this case was, whether a husband could give his wife authority to accept a bill of exchange for him in her own name. On the trial it appeared by the evidence, that the bill of exchange in question was directed to the defendant and accepted by the wife in her own name, and there was proof, and the jury found the fact,

that the defendant had recognized her authority to accept the bill.

It was contended for the defendant, that an action would not lie upon a bill against an unnamed principal, and that to bind the defendant the acceptance must be in his own name or in one intended to represent his name. On the other hand, the case of *Cotes vs. Davis*, 1 Camp. 485, recognized in *Prestwick vs. Marshall*, 7 Bing. 565, as also in *Prince vs. Brunette*, 1 Bing. N. C. 485, was a clear authority to show that a good title to a promissory note of which a married woman was payee, might pass by her endorsement in her own name, where there was proof of an authority from the husband to her for that endorsement.

The court of Common Pleas held that *Cotes vs. Davis* was in point, in the present case, and that the defendant was liable. It was observed, that the drawee of a bill might bind himself by accepting in a name other than his own, and that (assuming the authority of the wife,) the defendant *had* by her hand written her name upon the bill. It was the same as if he had written this by his own hand, in which case his liability would hardly be contested. It made no difference that instead of using his own name, he, the acceptor, was by his authority styled in the name of his wife. *Lyndus vs. Bramwell*, 17 Law. J. 121.

CONDITIONS AGAINST MARRIAGE DUTIES.

A devise made to the daughter to pay her a sum of money, if she will be divorced from her husband, is good as an absolute gift, but the condition is void because against the policy of the law. *Tenant vs. Brail. Tothill* 141.

An allowance to a married woman on condition that she

lived apart from her husband. The *condition* was held to be *contra bonos mores*, and void, because against the policy of the law. *Brown vs. Peck* 1 Eden 140. See Roper on Legacies, vol. 1, 757, 4th ed.

A testator gave an annuity to his daughter for the life of his wife; but in case she should at any time cohabit with her husband the same absolutely to cease and determine during such time as she should so cohabit. He also gave one-third of the interest of certain personalty to her during such time as she should continue to live apart from her husband; but if she should at any time cohabit with him he divided the same one-third between two other persons. At the date of the will the daughter was living apart from her husband, but before the testator's death she cohabited with her husband and continued to do so up to the time of testator's death. Held by Vice Chancellor Bruce, on 26th January 1846, that the condition was void and that the daughter was entitled to the annuity and to the one-third of the interest of the personalty, discharged of the condition. *Wren vs. Bradley*: S. C. 6 N. Y. Legal Ob. 282.

Medical Jurisprudence.

EFFECTS OF CHLOROFORM. &c.

The Boston Medical and Surgical Journal, in giving an account of the late National Convention of Physicians in that city, states:—

“Dr. Nathan R. Smith, of Maryland, Chairman of the Committee on Surgery, read a lengthy and elaborate report on that subject. A large portion of the report was devoted to a consideration of the great improvements in Surgery which the discovery and introduction of anæsthetic agents had enabled them to adopt. In reference to chloroform, the report says it is the most powerful agent of the kind known, and that care should be taken in administering it to the patient. It has been administered to

millions of subjects, and we have but fifteen cases of authenticated deaths supervening from its use. Alarm, therefore, on the subject is needless.—Much more cause is there for alarm, much more reason to apprehend a fatal termination in taking an ordinary railroad journey, than in inhaling chloroform, at the hands of a judicious and careful practitioner. Professor Simpson has published his opinion that one hundred lives have been preserved by the use of chloroform, where one has been lost by it. He further says, that the mortality where chloroform is used, is much less than in similar cases where it is dispensed with. Prof. Mott, of N. York, has performed operations which he would not have attempted without the aid of chloroform."

Dr. C. R. Gilman, of the College of Physicians and Surgery, of New York, read a report from the Committee on Obstetrics, in which anæsthetic agents were recommended, particularly in cases of instrumental practice. Notwithstanding this favorable account of the use of these extraordinary agents, it is proper to bear in mind that many cases have occurred in which death has been produced by them. The American Journal of Medical Sciences is full and authentic as to this point. In some cases the fatal results may, perhaps, be ascribed to the condition of the patient at the time of administering the remedy, and in others, doubtless, to the want of skill or care in its application. It is clear to our minds that these powerful agents are too dangerous to be entrusted to the hands of careless or unskilful practitioners, and the numerous melancholy results of this practice admonish the medical profession that it is not to be adopted on every trifling occasion. Where the pain of the proposed surgical operation is inconsiderable, and the patient well able to bear it without any serious shock to the system, the use of either of these agents, accompanied by a fatal termination, might draw the practitioner into serious danger on a charge of mal-practice.

Charles G. Page, Examiner of Patents in the last Report of the Commissioner of Patents, p. 25, makes the following statement and remarks on the inhalation of Ether:—

"Inhalation of Ether.—A patent has been granted for an instrument for inhaling ether, and other like materials, which is very simple, cheap, and ingenious. In administering ether, it is necessary to admit atmospheric air with the vapor of ether, and various contrivances have been introduced in the inhaling apparatus for securing a due admixture of air.—In the instrument recently patented, the vapor is administered simultaneously through the mouth and nose. The shape and size of the tube is such that it covers readily both these organs, and contains a sponge saturated with ether, and apertures for the admission of atmospheric air, all in a compact and convenient form.

The inhalation of ether was at first regarded with great caution by a portion of the medical world, and met with strong opposition from others. It is, however, working its way to the most extended use, and is now looked upon by the most enlightened as one of the most valuable and remarkable discoveries of the age. At the time a patent was granted for

this new application of ether, it was contemplated for use only in conjunction with surgical operations. But since its effects upon the system have been carefully studied, it has been introduced into medical practice for a variety of affections, and with great success. In obstetrical practice where its application was least looked for, it has proved of eminent service, and out of some 580 cases of accouchement reported recently by Professor Channing, of Boston, not one experienced any injury from the use of ether. Since the introduction of this great and beneficent discovery investigations have been made as to the *anæsthetic* property of other substances, and several others have been substituted for the sulphuric ether first used, and it has also been found that the effect upon the system to which the term *anæsthesia* has been given, may be produced by other substances than the ethers."

PROTRACTED GESTATION.

Dr. Charles D. Meigs, in a work recently published by Lea & Blanchard, on *OBSTETRICS*, sets down the ordinary duration of pregnancy as 280 days. But he maintains the possibility of its being protracted in some instances far beyond that term. He quotes the case related by Aadruba, of 13 months gestation, to which he gives full credit. He states also a case which fell under his own care in which, if the statements of the female are to be relied on, the pregnancy continued near 14 months, or 420 days.

The *Journal of Medical Sciences* in noticing the work of Dr. Meigs recommends it as one in which "the young practitioner will find a body of sound doctrine, and a series of excellent practical directions, which he will be induced again and again to consult, and always with profit."

THE LATE CHARLES GILMAN, ESQ.

This distinguished and highly esteemed member of the legal profession died at Quincy, Illinois, on the 24th of July last, of cholera, after a short and unforwarned illness of eleven hours. His death fell "upon his astonished friends like a thunder stroke from a cloudless sky." He was, at the time of his death, the reporter of the decisions of the Supreme Court of that State, and was also the editor of the *Western Legal Observer*.—The August No. of that interesting publication announces his death, and contains the proceedings of the Bar on the melancholy occasion. It is truly remarked by the publishers of that periodical that "the grief of his

professional brethren, the mourning of his large circle of friends, and the voice of his professional brethren eloquently prove how much he was beloved and esteemed where he was best known." His loss is deeply deplored by the profession throughout the United States.

The following is an accurate list of the Counties composing the Eastern District of Pennsylvania, over which the jurisdiction of the Circuit Court, sitting in Philadelphia for that District, extends :—

Adams,	Lehigh,
Berks.	Monroe,
Bucks,	Montgomery,
Carbon,	Northampton,
Chester.	Perry,
Cumberland.	Philadelphia,
Dauphin,	Pike,
Delaware,	Schuylkill,
Franklin,	Wayne,
Lancaster,	York.
Lebanon,	

The remaining counties of the State compose the Western District of Pennsylvania, for which District the Circuit Court is held at Pittsburg. The District Courts for that District are held at Pittsburg and at Williamsport.

ATTORNIES AS WITNESSES.

We learn from the *Western Legal Observer* that "the recent decisions in the English Courts in *Stones vs. Byron* and *Dunn vs. Packwood*, which have been followed by a similar decision in Pennsylvania, that an Attorney cannot appear in the same cause in the double capacity of witness and advocate, are about to be followed by the Courts in Iowa. Judge GRANT, of the 2d Judicial District, has already made it a rule of Court that no Attorney of record can act as witness for his client in the same cause.

"At the late term of the District Court for Johnson county, Iowa, in the case of *Crum vs. Foster*, the attorney for the plaintiff offered himself

as a witness for his client. He was objected to and finally declined to be sworn. Judge CARLETON, however, intimated, although it was his opinion that the objection ought to go to the credibility, rather than the competency of the witness, that he should hereafter follow and adhere to the decisions above quoted."

In Indiana, recently, in Judge M'DONALD's Circuit, the question arose whether an Attorney in a cause ought to be permitted to testify for his client in matters touching the general merits of the case. The Court rejected the evidence. [1 West. Legal Observer, p. 324.]

A correspondent of the Western Legal Observer, referring to the recent decisions against admitting Attornies as witnesses for their clients, says that he looks to them, when generally followed, "to do much towards improving and elevating the character of the Western Bar."

Mr. Justice ROGERS, in 8 Barr 521 says: "It is said and I agree, that it is a *highly indecent practice* for an Attorney to cross-examine witnesses, address the jury, and give evidence himself to contradict the witness. It is a practice which, as far as possible, should be discountenanced by Courts and counsel."

The learned Judge says further that there is nothing to prohibit an attorney from being a witness for his client "*when he does not address the jury.*"

We do not see that the *subsequent* act of the Attorney in "*addressing the jury,*" has or ought to have any influence in deciding the question of his competency at a *previous stage* of the cause. That question should be decided upon the facts and relations *existing at the time the witness is offered.* Nor do we perceive what measures a Court can with propriety take to "*discountenance*" a citizen in the exercise of his acknowledged legal rights. Gentlemen of the Bar submit with cheerfulness to the control of the Court, *while it keeps within its legitimate powers.* But if, while it acknowledges the *legal right* of the Attorney to give evidence for his client, it undertakes to use the accident of official position to control him in its exercise by *indirect and undefined means*—such as might fall under the denomination of "*discountenancing*" him, such attempt on the part of the Court would be repelled and resisted as a usurpation. If the *right* be acknowledged, the Court would be transcending its authority in attempting to trample upon it; and the *method by which the right is to be invaded* is immaterial, except that an open and bold disregard of it is to be preferred to the insidious, undefined and illegitimate process of "*discountenancing.*" If the practice be "*highly indecent,*" it is to be regretted that the common law allows such practices to prevail in its temples of justice. Such testimony has no tendency to further the cause of truth, and is positively injurious to the character of the Bar. The recent English decisions are therefore sound and ought to be followed.

New Publications.

A TABLE OF THE CASES contained in the three volumes of the *United States Digest*, and in the two volumes of the *Supplement*, alphabetically arranged with a *Reference* for each case to the volume and page of the *Report* whence the case is taken, and to the volume and page of the *Digest* where it is found. By George P. Sanger, Counsellor at Law. Boston: Charles C. Little & James Brown. 1849.

We have heretofore in the pages of this Journal, begged the publishers of the *United States Digest*, to furnish us with a *Table of Cases* to the five volumes, as being of great practical value to the profession in aiding a search for any particular case, and we are now happy to find that our suggestion has been complied with, and we have a volume of eight hundred pages containing the names of some fifty thousand cases, together with the volumes and pages where reported, and the volume and page of the digest where they may be found. This must have been, indeed, a most laborious undertaking; the amount of mere clerical labor in this volume is startling. The sole value of the book is in the care and accuracy with which it may have been executed; this, of course, can only be determined by a daily use of the volume, and not by a mere cursory glance at its pages, which is all we have been able to do; but this we know that the learned and laborious editor, Mr. Sanger, is esteemed by his brethren of the Boston bar, eminently capable of such work. To habits of the most laborious and thoroughly accurate character, he adds a discrimination and sound judgment which are enough to stamp excellence upon any work he may perform. The *United States Digest* may now be considered complete. We have all the Reports of this country digested down to January 1, 1846, and the whole made easy of reference by copious indexes and tables.

A SELECTION of Leading Cases in Equity, with notes. By Frederick Thomas White, and Owen Davies Tudor, of the Middle Temple, Esqrs., Barristers-at-Law: with additional Annotations, containing references to American cases. By John Innis Clark Hare, and Horace Binney Wallace. Philadelphia: T. & J. W. Johnson, Law Book sellers, publishers and importers, 197 Chesnut street. 1849.

At length, after having been announced for several years, we have Mr. Whites' *Leading Cases* decided in Courts of Equity. Much professional expectation had been raised by the announcement of an Equity book in character and plan, resembling Mr. Smith's *Leading Cases*, taken from the *Common Law Reports*. Mr. Smith's work has become a standard legal classic, and few professional men are without it, more especially the "American Edition" prepared by the competent hands of Messrs. Wallace and Hare. Messrs. White and Tudor, in the work before us, had undertaken a very difficult task, because the profession would necessarily compare their labors with Mr. Smith's, and estimate them by the same standard. It is with no small satisfaction that we are able to state

to the profession that the Equity Leading Cases are of a very high character indeed. Each case chosen has been so evidently because it was frequently referred to, and enunciated some distinct and leading principle in Equity. The book is highly interesting to all legal minds; in it will be found the best and highest efforts of the English Equity mind; the ablest judgments of the most distinguished Lords Chancellors, and the arguments of counsel no less remarkable for learning and skill. Considered in an historical light this volume is a substantial acquisition to the library of the constitutional lawyer; cases, principles, authorities, arguments and judgments, and decrees of the first historical importance, will be found in its pages. Courts of Equity always give a vivid picture of the state of society; vast amounts of property, and the most sacred relations of life are the constant theme of equity jurisdiction and adjudication. A vast range of discussion is marked out in this volume; many of the notes are complete essays in themselves on complicated and recondite branches of learning. The English notes are very satisfactory and exhaust the English cases and judgments. Thus much of the labors of Messrs. White & Tudor.

The American annotations are equal, and we think on some titles much superior to the English. The range of discussion marked out has been the same as the notes of the English editors. In some instances the field of investigation has been more extensive, because the American reports supply more copious and apt illustrations. The American editors very justly remark, "It will be seen, upon the whole, that the jurisprudence of this country has developed an equity system, scarcely less comprehensive, or less complete than that which has been established in England; and it is a conclusive testimony to the wisdom and practical usefulness of the English Chancery, that, at the suggestions of experience, its scheme has been adopted substantially throughout a country not influenced by considerations of authority, but proceeding freely in quest of essential justice, and under the guidance of a reason proud of its independence."

We would refer to the title of Subrogation in the learning of Principal and Surety, as an example of remarkable care, thoroughness and keen discrimination on the part of the American editors. The subject is exhausted; the authorities are all collected, collated, and the important principles deduced and stated. No where within the range of our reading have we found this subject so satisfactorily treated, and we refer the profession to it as a monument of useful industry, alike creditable to the editor and profitable to the profession. The notes in this volume are understood to be by Mr. Wallace, and it affords us much satisfaction to commend them to the attentive consideration of the anxious and overtasked equity lawyer or judge, as containing labors that will aid his toil, and add to his learning, frequently without compelling him to search the unsatisfactory pages of a digest to first find his authorities, and then diligently and painfully consider the cases themselves, and deduce hence equity principles and then practical application. This is the third really practical work that Mr. Wallace has contributed to the profession. They are all marked by that diligence, care and discrimination which are the unerring marks of a well trained legal mind which comprehends something more than mere cases, something beyond the mere citation of book, page and judicial name, which apprehends clearly and enunciates carefully and accurately a principle which is the fruit of mature study, and which is of practical and substantial value in the every day concerns of human life.

THE
AMERICAN LAW JOURNAL.

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DECEMBER, 1849.  
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Hays v. Heidelberg--Again.

[The following vindication of the decision of the Supreme Court, in *Hays vs. Heidelberg*, is from the pen of a highly intelligent and esteemed correspondent. Its publication in the November number was prevented by the loss of a portion of the manuscript, in the process of transmission. The opinion of the Court (9 Barr 203) was delivered by Mr. Justice BELL, whose integrity, learning and ability none will question.

ED. AM. LAW JOUR.]

HAYS vs. HEIDELBERG.

No self-imposed task can be easier executed than that of convicting any Court of the commission of error, or even of absurdity, if it is allowable *in limine* to assume for them a position they never intended, or attempted to occupy. By such an ingenious, if not ingenuous license, your October correspondent ("W.") has succeeded, to his own satisfaction, in proving that our Supreme Court in the above case, have maintained doctrines "novel" to him,

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and "unsatisfactory to the profession," as represented by him. It will be readily established, *e contra*, that he has not apprehended or approached the point decided — that the novelty is of his own fiction, and the judgment pronounced, as ancient as the abhorrence of the common law to all fraud, (Lord Mansfield, Cowp. 434, Lord Holt, Skin. 357, Chancellor Kent, 2 Johns Ch'y 49) and is well illustrated under the Statutes as early as Twynnes Case, 44 Eliz. 3 Co. 80.

What was decided will best appear by citing the words of the opinion Judge.

"It is a part of the plaintiff's case, that the sale was made without consideration, being in fact a contrivance to transfer the legal estate to the apparent vendee, subject to a parol trust for the benefit of the creditors and heirs of the decedent." 9 Barr 205.

The conclusion assailed follows in brief compass :

"The sheriff's conveyance being purely voluntary, and its direct tendency to hinder and delay the creditors of the decedent in the remedies afforded them by law, it is, unquestionably, as to them, fraudulent and void." *Ibid*.

The slightest comparison will satisfy the mind, that the point manufactured for impeachment essentially varies from that *really* ruled. "W." states the question thus: "Whether a *bona fide* sale to the administrator, under the above circumstances, was valid? The true question was — Could such a sale be pronounced to be *bona fide*?" In the essential attribute of *good faith*, with which he gratuitously crowns the sale in question, it was flagrantly deficient.

Did the Court mistake or misapprehend the plaintiff's case, as they presented it. *Imprimis*. They claimed under a deed, for a consideration of \$1 from William Wilkins, which recited that "he had purchased the property" in trust for the creditors and heirs of S. S. "and conveyed it to them," under the same trust under which he had held it.

William Wilkins (administrator and vendee) called by plaintiffs, testified—"I purchased the tract in question for the creditors and heirs of decedent. I never pretended to claim it as my property. The trust, on my part was open and notorious. I supposed until recently it had been declared in writing. All the world knew I did not pretend to claim it as my own. I paid nothing for the property when I purchased it. *The receipt by the Sheriff was a mere matter of form. No money passed. I PURCHASED AS ADMINISTRATOR.*"

Walter Forward, (also Administrator)—"I recollect a consultation among the administrators with regard to the sale of this property, as the only method remaining to liquidate the debts of the deceased. The guardian did not object to the sale being made, when I explained to him that the object was the payment of the debts, and to dispose of it to the best advantage for this purpose ; and the balance, if anything, for the children. I considered it a measure expedient to relieve the estate."

The effort to re-sell the land, in small parcels, was made and failed, by a change of the times. The land remained in the same state, the taxes were assessed and paid on it as the decedent's estate for eighteen years. It was then sold at Sheriff's sale to James Ross, Esq. under proceedings, now admitted and decided (*Payne vs. Craft*, 7 W. & S. 465) to have vested in him and his alienee, the defendant, in both cases—a perfect title, unless the prior sale to the administrator now set up, passed the whole estate, legal and equitable, beyond the reach of creditors, when liens have been kept alive, but never satisfied. The trust, on the face of the deed to the plaintiffs, the defendant contended, was extinguished by the sale to Mr. Ross on his execution, and that of another creditor. It will now be shown, exclusive of the reason and authority in the reported opinion, while following on the path illumined by its light—

1. That such a sale as that made to the administrator would have been fraudulent and void, if privately made by a living debtor.

- 1. Because, it was without any consideration.*
- 2. Because of the trust.*

3. *Because it was contrived to hinder, delay and defraud creditors.*

II. *Such sale was equally fraudulent, when perpetrated at the instance of an Heir or Executor, as if by one in full life.*

III. *Such sale was not aided by the employment of judicial process in making it.*

A fraudulent conveyance within the meaning of the Statute, 13 Eliz. ch. 5, is, in reality, none at all; but a mere formal transfer, executed, not to give the alienee the property, but to induce the belief that he has it, that he may hold it in trust for the debtor. Ellis Dr. & Cr. 158.

No sale ever reflected more graphically every feature of this definition, in all its legal deformity, than that under scrutiny. A judgment for \$50 before a Justice, was brought to bear on the land by the procurement of defendants, in pursuance of their preconcerted arrangement, and a sale effected, not to give the alienee the property, (for this he indignantly disclaimed,) but to induce the belief that he had it, when *re vera*, the beneficial interest was not changed. The purchaser held it, *as before*, subject first to the liens of the creditors according to their legal priority, but if it produced more than satisfied them all, any surplus proceeds were to be held for the children.

On this sale not one farthing passed. It was merely sham and nominal — a fictitious and ineffective form — an empty and unreal mockery. It was null and void,

1. *Because it was without any consideration.*

It may be safely asserted that, in a Court of Common Law, whether the question be produced on a demurrer, or special verdict, or receive its determination from a Jury—the total want of consideration as against a subsequent purchaser, has in general been considered conclusive evidence of fraud. Roberts Fraud. Convey. 73.

The presumption of fraud, raised by the Statute, from the want of a valuable consideration, was esteemed by the Lord Chief Justice in Twyne's case, to be so strong as to dispense with proof of actual and visible fraud. *ibid.* 427.

This authority dispenses with the fancied necessity for proof of actual fraud.

In the report of Twyne's case (Moor 638) the sixth badge of fraud enumerated was: that the donee had the use of the goods—bought and sold—killed the cattle, *changed* them and *spent* the corn in the family. All this was colored by an *account* made out annually between the donor and donee; *but no money was actually paid to the donee.*

How strikingly similar was the coloring effect of the account and the receipt! What "W." dubs "*an effort of financial skill rare in those early days*", in England and Allegheny, was alike absent in both cases, and alike disastrous to their fairness and stability.

2. *The sale was void because of the trust.*

On the plaintiff's own exhibition, it was made with the intention of all parties about it, contriving and executing, to prevent the creditors entitled to its proceeds from obtaining its fruits at that time—but in lieu thereof to hold out to them a future hope, that, instead of receiving their priority or dividend, they might some day all receive, *cent per cent*, and further if possible a surplus might be saved for the decedent's children. This was the private purpose, or the one made known to "the world" initiated—the public appearance was to be that of an absolute sale.

Fraud is always appalled with trust—(*nomen speciosissimus*)—and trust is the cover of fraud. Twyne's Case.

A sale purporting to be absolute, but attended with a secret trust, holds out false colors, and is evidence to prove the contract different from what it really was. The law presumes that he who buys, and takes evidence of the contract, which is in its nature false, intends to use it for the purposes of deception, and to defeat that purpose, declares the contract to be void for that cause. Parker vs. Pattee, 4 N. H. 178.

A sale of goods by a person in debt, in order to be considered *bona fide* with respect to creditors, must be made without any trust whatever, express or implied. Ibid.

The true interpretation of the statutes of Elizabeth is, that fraud under these statutes consists in the debtor's reserving to himself some interest or benefit out of the property conveyed. Wallace's note to 1 Smith's L. C. 41.

The fraud which renders void the contract is a secret trust accompanying the sale. Coburn vs. Pickering, 3 N. H. 14; 12 Mass. 110.

The leading object of the Stat. 13 Eliz. ch. 5. was to prevent those collusive transfers of the *legal ownership*, which place the property of a man indebted out of the reach of his *bona fide* creditors, and leave to him the beneficial enjoyment of that which ought in conscience to be open to their legal remedies. Roberts Fraud. Con. 434.

Care must be taken that there be no secret understanding, constituting a trust in the creditor, in derogation of the ostensible alienation, or the transfer will be deemed a cover by which other creditors will not be prejudiced; or in other words a change of estate will not under such circumstances be considered as having taken place. Jackson &c. vs. Brownell, 3 Caines 224.

The two last indicia of fraud in *Twyne's Case* were a trust between him and his debtor, and the gifts stating on its face, that it was made honestly, truly and *bona fide*. Ibid.

So that the precious fact relied upon by "W." that the Sheriff's deed, claimed under, was absolute on its face, and that there was no trust of any kind apparent on it—when such trust really existed, was *per se* a glaring badge of fraud which, from *Twyne's case*, down to the present inclusive, has condemned all similar contrivances. Every departure from truth is dangerous.

But "W." says, that the purpose or intentions of the purchaser when he buys can have no effect to convert an absolute sale by the Sheriff into a trust in his hands.

But see Contra 12 Pickering 89, 2 Fairf. 202, 3d do. 515, Borland vs. Mayo 8 Alab. 104, U. S. Dig. (1847) Frauds §62, 63.

The law says: Fraud consists in intention. Intention is a fact. Moss vs. Biddle, 5 Cranch 337.

The validity of a deed does not depend on the consideration. If the purpose be iniquitous, the conveyance will be void, though the consideration be valuable, not voidable—but void—utterly void. Wadsworth vs. Marsh, 9 Conn. 481, Swift's Dig. 282, 5 Day 341.

No title passes to a purchaser guilty of fraud in obtaining a sale, whether it be private or judicial. All that is said or done by the purchaser with a fraudulent intent is evidence. Hoffman vs. Strohecker 7 W 36.

Fraud in the purchaser at a sale *by the law* would of course vitiate his title. That fraud consists only in fraudulent intention. The test of fraud was principally in the circumstance whether or not the transfer conveys

the whole interest of the debtor. Wallace's note to Smith's L. C. p. 84.

An intention to obstruct creditors in subjecting property of the debtor to the payment of other debts, renders a sale, *ipso facto*, invalid, and the motive or intention may be proved out of the deed. Vernon vs. Morton, 8 Dana 263.

Declarations of the purchaser of intention in making a fraudulent purchase under the Statute of 13 Eliz. are admissible in evidence to defeat it. Kimmell vs. McRight, 2 Barr 38.

It was not necessary that the Sheriff should be involved in the contemplated fraud, or *particeps criminis*, because,

Any concert between the purchaser at Sheriff's sale, and the defendant in the execution, by which a trust is created between them, is covinous. Arnsey vs. Carlos, 9 Alab. 973; U. S. Dig. (1847) Frauds §63:

If a purchaser at Sheriff's sale, by a fraudulent combination with the judgment debtor, is enabled to purchase the property for less than it is worth—the benefit of which the latter is to reap, the whole sale is fraudulent and void. Storall vs. F. & M. Bank.

It would be perilous to contend that no such combination existed as to this sale, between the purchaser and judgment debtors, who were represented *in eadem persona*, and it requires no less assurance, to turn round the creditors to a fund diminished by executions, to keep from the sale every friend of the family, who would have been present and bidding, if they had not been assured that the children would be better provided for by their absence, than their competition with the creditors at a fair, full, unreserved sale.

As to W.'s position, "that the Court was mistaken in assuming that the Sheriff's sale, in this instance, was any trust at all," it involves an allegation that the purchaser (*clarum et venerabile nomen*) meant to be false to his pledges to purchase under the preconcerted arrangement, and he (W.) has surely forgotten that the deed from that Sheriff's vendee, under which alone the plaintiffs claimed, was subject to that identical trust which they called him to prove—under which he always honorably held, viz: "for the creditors and heirs of the decedent," and

subject to which only had he conveyed to them. If the Court fell into this error, it was by the confession and ratification of said trust by the plaintiffs, and to which they were irresistibly impelled—for they could claim only under said trust, or not at all—having exhibited no other title. They claimed not as heirs, or alienees of heirs, but as purchasers under the administrator—loaded with the trust which he never repudiated.

3. *The sale was void, because made to hinder, delay and defraud creditors.*

This Sheriff's sale, if successful, would have substituted for the hold of the creditors on real estate, mere personal remedies against the trustee, who was self-constituted, and gave neither bond or security, and, as to them, acted wholly *invita minerva*. In place of their legal rights, was sought to be forced on them a trust fund not subject to their grasp, as was their lien on the decedent's land, arising at our common law, even as limited by the act of 1797. In this aspect the sale was, to use the strong words of the Statute itself, contrived of fraud, covin, collusion and guile, to delay, hinder and defraud creditors; not only to the let or hindrance of the due course and execution of law and justice, but the overthrow of true and plain dealing between man and man.

Judgment creditors, with the means of payment in their hands, need not wait until it shall please assignees to sell real estate, although they were legally appointed. *Clark vs. Israel*, 6 Binn 390.

A purchase, made with intent to defeat another judgment creditor, in obtaining execution is *mala fide* and void against him. *Streoper vs. Eckert*, 2 Whart. 389.

A purchase of property, with notice of a judgment, bought for the purpose of defeating the plaintiff's remedy is void—*Wickham vs. Miller*, 12 Johns 320—although the purchaser paid a full price. *Waterbury vs. Sturtevant*, 18 Wend. 353. And the same principle held in *Geiger vs. Welsh*, 1 Rawle 353.

When a sale of property, *under execution*, is brought about by the defendant in concert with others, with the avowed object of defeating the

interest of a third person in the property, such sale will be deemed fraudulent and void, although the execution issued on a valid and unsatisfied judgment. *Beale vs. Guernsey*, 8 Johns 486; *Crary vs. Sprague*. 12 Wend. 241.

A sale of property for a full price, if purchased with a design to hinder and delay creditors, is fraudulent and void, as to them. *Trotter vs. Watson*, 6 Humphrey 509; *Peck vs. Kelly*, 2 Kelly 1.

A purchaser, under the execution of a *bona fide* creditor, is not protected by its merit, in a purchase which he makes in combination with the debtor, to hinder, delay or defraud other creditors. Among facts, which are badges of fraud, are contrivances to protect the estate from other creditors. *Yoder vs. Standiford*, 7 Monroe 485.

Where it appears on the face of a deed of trust, that the motive for making it was to prevent a sacrifice of the property, a bad motive is shewn—a motive to obstruct the ordinary process of the law in the subjection of property to the payment of debts, which vitiates the whole deed. *Vernon vs. Morton*, 8 Dana 263.

To prevent a sacrifice of property under execution is, as to creditors, a fraudulent purpose, and such a declaration on the face of a deed, vitiates it as to them. Purchasers under such a deed have notice, and creditors may reach the estate in their hands. *Ward vs. Trotter*, 3 Monroe 3.

II. Such a sale or purchase of an Administrator is equally within the Statute, as one by a living grantor.

A fraudulent conveyance is not only restrained when made by the vendor himself, but generally, every conveyance made of purpose and with intent to deceive, &c. shall be void. *Roberts Fraud. Con.* 588.

A fraudulent conveyance by the heir is void; so is one by the executor or administrator of the property deceased. *Doe vs. Fallows*, 2 ——— 460; 2 C. & J. 491; *Bateman's Case*, 1 Mod. 76.

If an heir have made a fraudulent and collusive conveyance to defeat the creditor of his remedy on the lands descended, it is void by the Stat. 13 Eliz.; 2 Leon. 11, per Dyer; *Brooke Debt* 238; *Plowd.* 441; *Poph.* 155. So if an executor make a fraudulent conveyance of the personal assets, the creditors shall avoid such conveyance by virtue of the same Stat. Cro. Eliz. 405. For by such fraudulent conveyance, nothing passes, as to the creditors, out of the grantor, but the property remains as assets in the hands of the representative, to answer the demands of the ancestor's or testator's creditors. 5 Rep. 60, *Dyer* 149 a & Note 180; *Roberts Fraud. Con.* 602.

Whenever an executor or administrator disposes of the assets of decedent without valuable consideration, the creditors, &c. may follow such

assets in equity. *Paget vs. Hopkins*, Gilb. Eq. Rep. 111; 4 Ves. Jr. 652.

This doctrine fully investigated in *Penna. in Fetue vs. Clark*, 11 S. & R. 380.

III. *Such fraudulent sale is not aided by the employment of legal process to carry it into effect, or make the conveyance.*

Where a thing is by law forbidden to be done, the prohibition extends to every circuitous mode of effecting the same. *Volus circuitii non purgatur*. What cannot be done *de directo* ought not to be done *per obliquum*. *Roberts Fraud. Con.* 587; 11 Rep. 74.

All fraudulent judgments and executions are within the Statute of 13 Eliz. It seems clear that such covinous and circuitous proceedings are void by the common law—(Brooke Tit. Covin & Collusion) Wallace's note to Smith's L. C. p. 59—nor shall any man avail himself as it seems of the operation, consequence or conclusion of law, upon his acts to defeat his creditors. Lord Hale, 1 Ventr. 257.

It is even a great aggravation of the offence, to make use of legal process in the accomplishment of a fraudulent purpose, as if a man intending to steal a horse, take out a replevin, and thereby obtain a delivery of the horse from the Sheriff. 2 Inst. 108.

A sale of land under an execution, if the purchase is made for the purpose of hindering, delaying and defrauding creditors of the defendant whose land is sold, is void as to all purchasers or creditors—prior or subsequent. Such a sale stands on no better footing than a sale made for that purpose by the defendant himself—the Sheriff being used as a mere instrument to effect this object. *Duncan vs. Forsyth*, 3 Dana 209.

Such a Sheriff's sale to an executor was pronounced void by President Judge Grier, and his ruling adopted in *Stuck vs. Mackey*, 4 W. & S. 199.

A sale made ostensibly under execution, but in fact, collusively for the purpose of screening the property from the defendant's creditors, stands on the same footing as a mere private sale. *Stevens administrator vs. Barret administrator*, 7 Dana 259.

What, then, is the finale?

A feoffment made by covin to defraud a judgment plaintiff and other creditors—the feoffer is still seized, as to the creditors, notwithstanding such feoffment. *Humberton vs. Howgel*, Hob. 72; *Leonard vs. Bacon*, Cro. Eliz. 233; *Chan. Rep.* 131; *Hildreth vs. Sands*, 2 Johns Ch'y 50; *Preston vs. Crofut*, 1 Conn. 427; 2d Hillyard Ab. (1st ed.) 326.

Notwithstanding such conveyance, the creditor may avail himself of all the remedies for collecting his debt out of the property which the law has

provided for creditors, and in so pursuing them, he may treat the property as the vendors. *Owen vs. Dixon*, 17 Conn. 142.

I have drawn largely from authority and precedents to vindicate the decision attacked, although perhaps it was supererogatory labor. Such citations may also be "novel" to W.; but, it is hoped, not "unsatisfactory to the Profession"—the "learned" Reviewer excepted.

C.

Supreme Court of Pennsylvania--Western District.

[Reported for the American Law Journal by JAMES S. CRAFT, Esq.]

ABSTRACTS OF DECISIONS.

PITTSBURG, SEPT. TERM 1849.

Gales vs. Hailman. } DISTRICT COURT OF ALLEGHENY CO.
Hailman vs. Gales. }

GIBSON, C. J.—In an action, by the Owners against the Carrier, for the value of Goods lost during transportation, the Carrier cannot set up in his defence that a portion of the value has been paid to the Plaintiff under an insurance effected by him.

The Plaintiff is entitled to recover the whole value of the goods lost by the Carrier, and the insurers are entitled to come in under such recovery for their reimbursement.

The suit is rightly brought in the name of the legal Plaintiff on the contract of bailment; and the recovery will be applied: 1st, to compensate the Plaintiff the residue of his loss, not received from the insurers; 2d, to repay the insurers—the action being as to this portion, equitably for their use, and the Plaintiff the Trustee.

The Carrier and Underwriter are not bound to contribute, as if both were insurers, to assist in discharging the policy.

In fresh, as well as salt water policies, the skill of the Master in the particular navigation enters into the calculation of the risk, and is therefore matter of substance. An action for money paid to the insured would not lie against the Carrier to reimburse the insurer. His remedy is in the name of the Owner, as above ruled.

Boreland vs. Nichols. [D. C. Allegheny co.] BELL, J. A widow's acceptance of a devise under a Will, under the Act of 1797, § 10, (re-enacted 1833 8th of April, § 11,) does not bar her dower in land aliened by her husband alone in his life time. The point is substantially the same as *Leinaweaver vs. Stoeber*, 1 W. & S. 160.

Elliot vs. Dunlavy. [C. P. Allegheny co.] GIBSON, C. J. The principle that the conveyance of a non compos by record, is neither void nor voidable applies to a several title acquired by judgment and partition, although there is no personal caption and certificate.

Alexander & Morrell vs. Plumer & Crary. [Clarion co.] COULTER, J. The pilot of a river boat, destroyed in passing over a dam, where the question was whether the boat was lost by the dam being an obstruction to the navigation, or whether by his negligence or unskillfulness in piloting her over it, is not a witness for the owners of the boat against the builders of the dam.

If a dam is an obstruction to the navigation at any stage of water, the owners of the boat are not bound during high water to wait until the river falls to pass it.

Heath vs. Armstrong. BURNSIDE, J. Warrants issued after the Land Office closed in 1794, are not evidence without proof from its books that the officers were legally authorized to issue them under the exceptions specified by the Acts, &c.

General principles regulating surveys stated.

Ziegler, Proth'y & al vs. Commonwealth on the suggestion of Brewinger. [Butler co.] BURNSIDE, J. The Prothonotary of the Court of Common Pleas of a county of this Commonwealth is bound to make searches for judgments and give certificates of liens or their absence.

A Prothonotary is liable for a false certificate as to liens—although it was not sealed, and there was no evidence he was paid the legal fees for it.

Moore vs. Long. [Butler co.] BURNSIDE, J. A verdict in slander for the Plaintiff of "one dollar damages, and that the Defendant pay the costs," carries full costs.

Hopewell Township vs. Independence Township. Per Cur. The settlement of a pauper has a local habitation in respect to the Township itself—and the fragment of territory into which it falls (if the Township be divided) is to maintain the pauper, whether he had been chargeable to

the parent Township or not. Under the act of 1836 there was to be no contribution to subsequent maintenance as previously.

Sankrey vs. Reed. [Mercer co.] Per Cur. Parol evidence is admissible to prove an agreement, made at the time of a general written revival, to confine the lien of a judgment, to one of several parcels of land originally bound by it.

Garwin's Appeal. [Mercer co.] BELL, J. The act of 1840 was not intended to limit the right of the Orphans' Court to review their decrees, except in the cases specified.

Items included in a guardianship, or other similar account, are not binding on creditors or sureties who, not being parties to such settlement, could not appeal from it.

Minesinger vs. Mair. [Warren co.] Per Cur. When a man draws on his debtor, he draws on the fund in his hands and not on his person for a loan, and when the debtor honors the draft there is a payment pro tanto. It is not a case of defalcation.

Silverthorn vs. McKinster & al. BELL, J. Where land is devised to be sold to pay debts, &c., and the surplus proceeds divided among legatees, it is not the subject of ejectment unless there is an election by all the legatees to accept it as land. The executors should be pursued under the act against delinquent trustees for account, &c.

A power to sell under a will may be executed, as regards the Statute of Frauds, &c. as a sale made by an individual of his own estate.

Treasurer of Allegheny College vs. McCord. ROGERS, J. It is not evidence of fraud admissible to sustain a defence against the payment of a note, that the agent of the payees, at another time and another place, made fraudulent representations to procure other notes for the same institution.

McMahon vs. Sloan. [Butler co.] BELL J. A sale of personal property invests even a bona fide purchaser with no more than the title the vendor had—nor is there any exception in favor of market overt, which have no existence here. [2 Kent Comm. 324, 20 Wend. 275, 2 T. R. 63 376, 2 H. Bl. 14, 5 T. R. 367, 2 Cowp. 335, 2 Stark 512, 16 Johns 159, 11 Wend. 80, 9 Johns 197, 13 Pick. 7 W. & S. 374, 8 S. & R. 500, 20 Wend. 266.] The exceptions are 1st, money, checks, notes, &c. termed "currency" which pass by delivery, only; 2d, where the true owner confers on the party selling to a bona fide vendee, the apparent right of property, or of disposal as agent, as where the owner with the intention of sale parts with the property, though under such circumstances of fraud as would authorize him to recall the possession from the hands of his vendee, and where he has given such evidence of the right

to sell, as by custom, &c. usually accompanies such authority, as a bill of lading.

Entrusting property on loan and for use by a father with a son, is not such a permission to the bailee to use the article as his own, as will mislead a purchaser from such bailee, and render the sale valid against the bailor and true owner. If the bailee asserted his ownership with the bailor's knowledge and acquiescence, it would be otherwise.

Keymborg vs. Borbridge & Co. [D. C. Allegheny co.] Per Cur. (Adopting Judge Lowrey's opinion.) A factor who had pledged goods consigned to him, and suffered them to be sold on execution against him, and the proceeds of sale applied to his own debt, is not a competent witness for the owner of the goods, in an action of Trover brought to recover said goods or their value from the purchaser—being adduced to prove that such purchaser bought them with knowledge that they belonged to plaintiff, and were not the property of said factor.

Jester vs. Jefferson Township. BURNSIDE, J. The Overseers of the Poor of a township are the parties next in interest to be substituted in ejectment on the death of the plaintiff, who, after the institution of suit, became a pauper, and chargeable.

Dobbins vs. Brown & Williams. GIBSON, C. J. To recover on a covenant of general warranty in a deed, there must be an eviction laid and proved, not that it need be necessary by process, or the application of physical strength, but by the legal force of an irresistible title—at the least there must be an involuntary loss of the possession.

A covenant of warranty does not extend to an entry by the authority of the State in the exercise of its eminent domain, as to make a Rail Road or Canal.

Stump & Gunkle vs. Hutchison. Per Cur. If a Bill of Lading contain the clause "*the dangers of the river and fire excepted*," it must be introduced into the Narr. If it is not—such conditional Bill cannot be received in evidence, for there is a substantial variance.

Joyce's Estate. Per Cur. The Court, at the instance of one seeking security, will not take a fund from a party who has a hold on it, to throw him on another, not in Court, especially if the lien of the latter had expired.

OCTOBER 15, 1849.

Clark vs. Dougan. [Butler co.] C. J. An intruder on land, who suffers himself to be assessed for less than the number of the acres in the warrant covering the ground on which he is located, deserts the lines of the tract, and thereby abandons his constructive possession altogether, and loses the benefit of it, as protecting him by the statute of limitations; if its continuity be broken, but for a year, it is gone.

If the Assessor assess but a part of it to the settler, he must return the residue as unseated, and the settler is guilty of a fraud in claiming by adverse possession, what he does not pay taxes for.

OCTOBER 15, 1849.

Bollin vs. Sherer. [Somerset co.] C. J. The act of 1729-30 respecting clandestine marriages, inflicts the penalty for violating it on the Justice, &c. only where the parents live within the province now Commonwealth.

Commonwealth ex. rel. vs. Fullerton, &c. [Westmoreland co.] COULTER, J. Although the name of the county, within whose territory a township is erected by a legislative act, may not be named, it will be collected from boundaries of streams, &c. well known; and the old townships are restricted to the limits left to them after setting apart the new township.

Westerman vs. Means. [Butler co.] COULTER, J. The condition of a bond being: That T. M., a claimant of part of the land sold, for which the bond was given, shall, on or before a day certain, release his claim, and if the same be not then released, a deduction to be made from the bond of the purchase money according to the number of acres claimed at the price of the whole. The time thus fixed is of the essence of the contract; and if the release be not procured by that day, the payment of the bond cannot be enforced as to the quantity of land stipulated to be released.

Alexander vs. Herr. [D. C. Allegheny co.] GIBSON, C. J. In an action for mesne profits, instructions that the Jury might find the expense of the plaintiff in prosecuting this claim, and such other damages as they may think the plaintiff entitled to recover from the evidence, held to be erroneous.

What may be recovered in such action?

Hazelbaker vs. Reeves. [Westmoreland co.] ROGERS, J. To take a case out of the Statute of Limitations, it is not necessary that the acknowledgment of the debt shall fix a precise sum—if it be so definite that a Jury can fix it with as much exactness as in cases where there is no plea of the Statute.

Hugus vs. Walker. [Somerset co.] COULTER, J. Evidence cannot be rejected because it may be impugned or weakened by that given against it.

The following charge, by President Judge J. S. BLACK, was adopted by the Court.

Where a man makes a parol sale and receives the purchase money, he cannot set up the statute of frauds against the validity of the contract. So where he makes a gift by parol, either to his son or a stranger, if the

donee has gone into possession in pursuance of the gift, and made valuable improvements on it, the land cannot be claimed back again. But such facts ought to be clearly and satisfactorily proved.

Where a son goes into possession of his father's land and makes improvements, a Jury is not to infer from that, in the absence of other evidence, that the father gave him the lands. Neither are loose declarations of the father to his neighbors in casual conversations, without any explanation how it came to be his, sufficient evidence of a gift. Still less are such things evidence of a parol sale, of which a Chancellor would decree specific performance.

Petition of McCullough. [Indiana co.] Per Cur. A limitation over is not necessary to a condition or conditional limitation attached to a devise of the profits of land to a widow—that she shall not marry.

On such widow's marriage, the wife's interest in the premises ceased—the right of possession devolved on the executors, and they become liable to account for the profits to the children or their guardian. But the Orphans' Court has no jurisdiction of a bill against the Executors to compel them to pay over the proceeds of such devise, although it has of a legacy.

Snyder vs. Snyder's Heirs. [Westmoreland co.] ROGERS, J. The plaintiffs below were Heirs claiming the possession, by virtue of a parol contract with their ancestor, under which he had received possession. Evidence that the vendee, on his death bed, delivered up the keys of the mill erected on the property to vendor, and told him to go and take possession, as he intended him to have it after his death, was offered to shew the necessity of tender of purchase money before suit brought, it being unpaid, and on the ground that the vendor was in possession by vendee's consent.

It was rejected because the offer was not attended by an offer of proof that the repossession was taken in pursuance of these death bed acts and declarations of vendee, and it could not be inferred that it was. (Marked "not to be reported.")

Truby vs. Sybert. [Armstrong co.] BELL, J. Although the parties be different, a record is admissible to prove the existence of a former action, with its legal consequences, as an independent fact. But not to prove any fact on which such judgment was founded unless it was between the same parties or privies. 3 Greenleaf R. 316, L. Raymond 744, 8 Shepl. 492, 1 W. & S. 360.

The rule 1 Greenleaf Evid. §195 was adopted.

Admissions made by a party do not bind him because they were made in a particular contest; but because they emanated from him, and it is not material when or where.

OCTOBER 19, 1849.

Bell vs. Bell & Co. [Cambria co.] COULTER, J. It is commendable delicacy for an Attorney to retire from the argument of a cause, when it becomes necessary for him to testify; but he may be a competent witness in a cause pending in which he is concerned as counsel.

S. P. decided in *Laughton vs. Shields* at this term.

Thompson vs. Clark. [Westmoreland co.] BURNSIDE, J. A widow may recover on the possession of land held by a title to her and her husband, which they had agreed to sell for considerations not fulfilled, the agreement not being acknowledged by her, and not ratified by her after her husband's death.

Seener vs. Baughman. [Westmoreland co.] C. J. Where the vendor conveys by courses and distances, his covenant of warranty extends to the entire quantity of land included by them—and although described to have passed to him by a chain of conveyance, the warranty is not restricted to the primitive bounds of the tract.

Culbertson vs. Iselt. [Indiana co.] COULTER, J. The nominal payee of a note may be a witness to prove that the note was made payable to him for the use and accommodation of another person (the defendant) not a party to the note.

The Court will not reverse the Court below, in the absence of the facts on which they adjudicated.

OCTOBER 15, 1849.

Craig vs. Shields. [Westmoreland co.] ROGERS, J. The equitable title of a vendee under articles of agreement, on which a considerable portion of the purchase money has been paid, does not pass under a levy and Sheriff's sale of all his right, title and interest as Tenant by the Curtesy; although such misdescription in the levy, &c. was made by the Sheriff, or at the instance of the Plaintiff or his counsel, and although defendant knew of the error.

Such an equitable interest cannot be sold, although levied on as an estate for life, as above mentioned, *without an inquisition*; and although the vendor had disseised or obtained possession from the vendee.

The fact that defendant knew of it could be found by the Jury, only on clear, distinct, and satisfactory evidence.

Under the circumstances of this case, equity would not presume that the vendee had abandoned his contract, or authorized the vendor to rescind it, although eighteen years had elapsed since its date, and the property risen in value by time—there being sufficient evidence of vendee's pursuit, and no improvements, &c. by vendor.

OCTOBER 29, 1849.

Lobingrer vs. Mechlings Er'rs. [Westmoreland co.] Per Cur. When
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one Executor conveyed land to the other, without taking security to the Heirs for the purchase money, it was decreed that he should account for their share to one of the Heirs entitled.

McCleery vs. Henry. [Westmoreland co.] BURNSIDE, J. The principle of *Bantleon vs. Smith* is a rule of property peculiar to Pennsylvania, and not now to be disturbed—but there is no lien on the land without the clause giving the right of re-entry. *Sands vs. Smith*, 3 W. & S. 9.

Articles of agreement for rent received cannot operate as a deed although no time be limited thereon.

Coeck, for use vs. George. Per Cur. When an examined witness is discovered to be interested, the only course left is to withdraw his testimony from the Jury. The truth of evidence to prove his incompetency may be determined by the Judge, or referred to the Jury, in his discretion.

A house erected on the soil of another, not being a chattel, belongs to the owner of the soil.

(Marked "not to be reported.")

Reed vs. Reed BURNSIDE, J. Where the vendee of land (by a parol contract) had possession, and the vendor said he had received all the purchase money but \$40 00, the Court should have left it to the Jury, so that they might find a conditional verdict.

Cavett's Appeal. [From the Orphans' Court of Westmoreland co.] BELL, J. Bill of Review entertained three years after confirmation of proceedings in Partition, to correct an error by which a larger interest or share had been awarded to one of the parties thereto, than he was entitled to.

McLain vs. Snyder Township School District. [Jefferson co.] COUTER, J. The President of the Board of School Directors has no authority, as such, to make contracts for the Board, who can only act by a majority regularly convened, or by a Committee of their appointment.

Bricker vs. Potts. [Indiana co.] ROGERS, J. "You cut up a parcel of hats, and then swore a false oath against your father—that he did it. You swore a lie, and it is in black and white in Westmoreland county—you swore a lie, and it is on record at Greensburgh." These words with proper innuendoes of malicious mischief and perjury held actionable, without any colloquium of judicial proceedings, or of an oath judicially administered to plaintiff.

Altman vs. Altman. [Westmoreland co.] Where the defendant in a former ejectment, on being turned out of possession, institutes a second ejectment on the same title, proceedings will be stayed in the latter action, until the costs of the former are paid.

Scarfe & Co. vs. McDonald. [Allegheny co.] ROGERS, J. Although the value of the property is the ordinary measure of damages in Replevin, the jury may enlarge them beyond such value and interest where there has been an outrage in the taking, or vexation and oppression in the detention, as in an action of trespass. It is unnecessary for the plaintiff to resort to one action to repossess himself of his goods unlawfully taken, and another for his damages. 21 Wend. 144; 1 W. & S. 516; 10 John. 378; 20 Wend. 172.

Wilson vs. Houser. Defendants holding under color of title may resist successfully a plaintiff who claims under a fraudulent voluntary deed.

This charge held erroneous—"If the deed was voluntary, viz: without consideration other than love and affection, it might still be void against creditors, if at the time it was executed the grantor was engaged in a hazardous business, although there was no actual intention of defrauding any one,"—3 Pa. 160; 12 S. & R. 448; 1 Sm. L. C. 34.

The law is—that to avoid a conveyance by one indebted, the debts must bear some proportion to the property of the grantor, which may render the payment of the debts doubtful.

Uptinger vs. Bryan. [Armstrong co.] BURNSIDE, J. How far the Court will notice an error not assigned? 10 S. & R. 55; 2 Binn. 168; 17 S. & R. 277; 5 W. & S. 87.

The Court reserve this right, as in *Anderson vs. Long*, to secure substantial justice.

Marple vs. Myers. [Indiana co.] BELL, J. Reversions and remainders are not within the statutes of limitation, until the right of entry accrues by the determination of the precedent estate—therefore the statutes do not run against infants, claiming under their mother's estate in fee, until after the death of their fathers, being tenants by the curtesy.

Jordan vs. Hurst. [Westmoreland co.] COULTER, J. On a negotiable note endorsed when overdue, there is no necessity for demand and notice to charge the endorser—such endorsement being considered as the making of a new note, and imposing on the indorser the primary obligation of a drawer. *Brown vs. Davy*, 3 T. R. 60; *Bank of N. America vs. Barriere*, 1 Y. 360; *Snyder vs. Riley*, 6 Barr 164, sustained; and *Colt vs. Bernant*, 18 Pick. 260; *McKinney vs. Crawford*, 8 S. & R. 351; disapproved.

OCTOBER 29, 1849.

Bash vs. Bash. [Westmoreland co.] Judgment on a verdict for plaintiff for \$2,949 00 in a trial between the same parties as the case reported 9 Barr 260—affirmed on division of opinion—(COULTER, J. having been of counsel before appointment.)

Stokely vs. DeCamp. [Westmoreland co.] ROGERS, J. The Com-

missioner of Pensions appointed under the act of Congress, 3d March, 1837—to judge and determine on all applications for pensions, &c.—with appeal to the Secretary of War, &c. is a special tribunal, and its judgments, decrees, &c. are final and conclusive, as to law and facts.

The certificate of William Wilkins, Secretary of War, awarding a pension to certain children of a revolutionary officer, cannot therefore be reviewed by this Court.

Graham vs. Graham. [Westmoreland co.] C. J. "This writ of error," (runs the opinion,) "was brought to confront this Court with its predecessors, and compel them to overrule two of their decisions (*Falconer vs. Montgomery*, 4 D. 232, and *Passmore vs. Pelitt*, 4 D. 271;) or one of our own (*Graham vs. Graham*, 9 Barr 254). This dilemma is, however, not presented. Although formerly unnoticed but not unknown, the cases in Dallas are clear and indisputable law.

The reasons given in the first for disregarding *Hall vs. Lawrence*, are not applicable where a party declined pressing his right to be heard at the proper time until, finding the cause going against him, insists upon a right he ought to have claimed before.

It is to be inferred from the expressions of the Court in *Hall vs. Lawrence*, 4 T. R. 589. that there was notice of the appointment of the umpire, and the time and place of his sittings—and the want of notice is equally deducible from the Pennsylvania cases. Chief Justice Shippen and his associates never applied these remarks "to a party who had put himself in the predicament of a spoiled child, crying after what he had rejected."

A party who has not insisted on the insertion of a clause in the submission for the appointment of the umpire before hand, and for his attendance at the meetings for the purpose of qualification, should not have the power to subject the other party to delay, and the chance of additional expense from a further examination of witnesses.

Before a party should drag his antagonist over the same ground, it should appear that he was ready and anxious, but not permitted to be heard. Where he has stood out with notice, or waived it by refusal to attend, the case is against him.

If a submission under the act of 1705 (1836) does not require an account to be reported, it is not required—and if it is to settle every matter in controversy, it is unnecessary; and not being subject to revision, its absence can do no harm.

Emerson vs. McCabe. [Indiana co.] COULTER, J. . Where a note was given to raise funds to launch a partnership, evidence is admissible to defeat or curtail a recovery by shewing that the payee was unfaithful to his co-partners, the drawers of it.

Wilson vs. Houser. [Armstrong co.] ROEGER, J. Although a sheriff's sale would be irregular where condemnation was under an Alias Fi. Fa. while an extension of the original Fi. Fa. was in full force and not set aside, and an application made in time to set aside such second execution, or the writ of Vend. Exp's., or the sale before the acknowledgment of the sheriff's deed, would have been successful; yet such irregularity is cured by permitting the sale and deed to pass without objection. The debtor waives his right as against the purchaser.

NOVEMBER, 1849.

East & Richey vs. Wilson. [Fayette co.] BELL, J. If a creditor has the means of satisfying a debt due to him, either actually or potentially, and permits it to escape, his negligence discharges a surety for his debt; but it must distinctly appear that such means might legally have been retained by him in satisfaction, and was not deposited specially for any other purpose.

To authorize the introduction of separate items of testimony as parts of a connected whole, it must appear that they have some relevancy to the subject matter in dispute in themselves, or a *probable* connection between them and the facts offered to be proved, must be indicated.

Gilbert vs. Watson. [Washington co.] ROEGER, J. Forbearance to sue for a stipulated period is not a sufficient consideration to support a promise to pay the debt of another — if the promisee could not have sued within that time.

Stephens vs. Myers. [Greene co.] Per Cur. A defendant has no right by the act of 1806, to amend his plea after judgment on demurrer. If one demurrer is withdrawn, he should withdraw a defective plea before a second demurrer. Nor can the defendant have the benefit of an amendment at the trial, by filing a new plea.

Shaw vs. Boyd. [Fayette co.] COULTER, J. After a judgment has been removed to the Supreme Court and the judgment below reversed, and judgment entered for the plaintiff on the verdict, which was remitted to the Court below but no judgment found in the latter Court, it will be presumed there was one entered for the purpose of supporting a judgment on the plea of *nul tiel record* on a subsequent scire facias now brought into this Court.

Strong presumptions are tolerated in favor of records irregularly kept after great lapse of time.

Reciting the judgment entered in the Supreme Court as one of the lower Court, amendable.

The suggestion in the scire facias, that a feme covert in the original judgment of dower, she being the meritorious party to the proceeding,

had become sole, is immaterial if not put in issue by plea in abatement or otherwise.

Linderman & Shepley vs. Berg. [Fayette co.] Per Cur. The vendor of defendants in ejectment (having no reversionary interest) although conveying with warranty, is not entitled to admission as co-defendant.

Nor would a landlord be admitted as defendant where, with his application he lays ground for delay, by claiming privilege of continuance as a member of Congress until its adjournment.

Abrams vs. Musgrove. [Fayette co.] COULTER, J. An old man, disabled by palsy, directed a note to be drawn in the name of an agent, as his guardian, as the obligor, and to be signed by that agent who signed his own name with the addition of "Guardian." The agent is a competent witness without a release.

Clemens vs. Gilbert. (Washington co.) Per Cur. The certificate of a Justice of the Peace, attached to the entry of the appeal bail, but not contained among his docket entries — that "*Defendant offered to confess judgment for five dollars before rendering judgment*" is no part of the transcript, and no better than the unofficial assertion of the Justice, which would not be received if under oath.

Wright's Appeal. [From the Orphans' Court of Washington co.] ROSKAS, J. Devise—"I will and bequeath to my wife my farm during her life time, and after her decease, to my son Thomas. If he chooses to accept of it, he is to pay \$1700 — \$1400 to my sons J. & S., \$300 to my daughters M., and A., and J." creates no charge on the land.

Thompson, Exec'r, vs. Playford. [Fayette co.] BELL, J. The return of referees that the parties before them had agreed to adjourn to a different town, is sufficient evidence in a Court of Error of such adjournment.

Jones vs. Shacklett & Glyde. [Greene co.] President Judge S. A. GILMORE affirmed. Notwithstanding a distinct charge on books of original entry to one person, it is competent for the vendors to prove that at the time the entry was made, another person was liable as the vendee, for the merchandize sold.

Evidence of admissions made to witnesses, who anticipated a law suit and prepared to guard against it, is not weakened by such motives or precaution; on the contrary such intention might make them more distinct in their recollections.

Garrard & Lantz. [Greene co.] BELL, J. Where the vendee of land himself becomes the purchaser at the judicial sale of the land, he remains liable for the residue of the purchase money due to the vendor. If a stranger purchases, this liability depends on the fact whether at the time

of the last sale, the vendee had in his hands a sufficient amount of the purchase money to extinguish the incumbrance.

The rule is not varied, whether there was a conveyance of the legal title, subject to the incumbrance producing the sale under execution, or the legal estate remained in the vendor and the judgment was recovered against him, after his sale to the vendee.

As the vendor is regarded as trustee of the legal title for the benefit of the vendee, so the latter is esteemed as trustee for the vendor of the beneficial interest in the land to the extent of the unpaid purchase money, and although after a judicial sale and purchase by the vendee, the vendor cannot enforce payment by ejectment; an action of covenant will lie in his favor. The vendee cannot keep the land and the money he promised to pay for it.

Fullerton & Wade vs. Stouffer. [Fayette co.] BURNSIDE, J. Where the rent was appropriated by the terms of the lease to the payment of a debt which the lessor owed to a third person, and for which the lessee was security, it is considered *paid* to the landlord from the time of the contract, and does not pass by a sheriff's sale, to the purchaser under the 119th and 120th sections of the act of 16th June, 1836.

McClelland, for use vs. Smith et al. [Greene co.] Per Cur. A bond under the act of Assembly of 12th July, 1842, to answer for fraud, &c. is well taken in the name of the Associate Judge.

Such a bond "to appear, answer and abide the decision" is null.

If there is an adjournment after appearance — there must be a new bond.

Willis vs. Willis. [Greene co.] COULTER, J. In a collateral proceeding notice of an inquisition of lunacy will be presumed, although not apparent on the record.

Although an attorney may refer his client's cause, yet he cannot enlarge the power of an auditor of the Orphans' Court, to whom specific powers were committed.

The return of the auditor is not evidence of the enlargement of his authority, nor his report under such supposed extended authority conclusive.

Hill vs. Scott. [Washington co.] COULTER, J. Original entries in a day book kept at a coal mine, partly written in pencil, are admissible.

The testimony of workmen employed about glass works supplied by plaintiff, received in corroboration of plaintiff's account — to shew the amount usually consumed there.

Jones vs. Patterson. [Fayette co.] BELL, J. One holding the legal estate in land, cannot support the plea of *non tenure*, in an action of dower *unde nihil habet* by force of his agreement with a purchaser, by which the

latter took a beneficial interest in the property to the extent of the purchase money paid.

Whether the legal tenant would be liable to damages under the Statute of Merton, which was not made in contemplation of distinct legal and equitable interests in the same land? *Dubitatur.*

King vs. Deets. [Fayette co.] BURNSIDE, J. Although the defendant claimed under a fraudulent deed from his father, made in contemplation of bankruptcy, he was allowed to retain possession against a sheriff's vendee of his father's estate, after shewing his father's discharge and assignment as a bankrupt, prior to the sheriff's sale.

Hadden vs. Reeside. [Fayette co.] Opinion of President Judge SAMUEL A. GILMORE affirmed and adopted. If there be two considerations for a promise, one good and the other not unlawful, but frivolous or worthless, the promise will be sustained.

Contrary to that anomaly of the law, existing as to a promise *revived* to avoid the effect of the Statute of Limitations, where a promise is made after a discharge by bankruptcy—the declaration should be on the new promise.

The Estate of Blocker & Co., on the affidavit of Overholt. [Fayette co.] ROGERS, J. Although an affidavit may not state all the grounds necessary to obtain an issue for the distribution of monies arising from a Sheriff's sale, yet if the application of the attorney state them, and the decision of the Court assume the facts necessary, the application will be sustained in this Court. On a question whether the debts were against partners, parol evidence will be admitted to explain the judgments and show that they were for partnership debts, although they appear on the record as ordinary judgments against the individuals of the firm.

Mackey vs. Robinson. [Fayette co.] GINSON, J. A farm owned by seven children was let for a term of years by their father, with the permission of three of them—being adults. The father died in the middle of the term; neither debt nor assumpsit will lie for rent supposed to have accrued after his death—there being no contract with the tenants afterwards.

Hamilton vs. Whitely Township. [Greene Co.] ROGERS, J. Devise—"to my son Robert Richey's male heirs, all and singular my personal property, with the upper end of my plantation, reserving a living for myself and my wife Sarah as long as our natural lives continue—is a devise of the legal title in presenti, and the reservation of a living to devisor and wife in the nature of a charge payable out of the land. It is neither *vi-vum radium*, or an estate on condition. Nor is there any estate in the land for which ejectment would lie. The remedy for recovery of the maintenance, is in the Orphans' Court.

Hall vs. Stewart. [Fayette co.] COULTER, J. An action of covenant will lie on an agreement under seal, between tenants in common, in relation to farming their common land, and plaintiff may in such action recover a reasonable rent, as expressed by said agreement upon proving what it should be to the satisfaction of a Jury.

Watson & McCahan vs. Bagley & Smith. [Washington co.] GIBSON C. J. A binding appropriation of money to a particular use by any writing is an assignment or transfer of its ownership, as by a letter of attorney — which is not revocable, if executed upon a sufficient consideration.

Harger, et al vs. the Commissioners of Washington County. BELL, J. A bond conditioned "that the obligors shall pay the costs imposed on G. H. by the Court of Quarter Sessions of W. County, of which he, the said G. H., in this case stands charged," may be enforced without any sentence being passed against said G. H. for the crime he was convicted of by verdict.

Before issuing an execution on a judgment entered by warrant on such bonds, the costs must be taxed by the proper Court or its officer — and items ascertained.

Restitution is, however, *ex gratia* and not of right, and will be refused where the process is set aside for a mere slip, and there is danger that plaintiffs may lose their demand.

Brownfield vs. Brownfield. [Fayette co.] C. J. A division line designated by will as running from "a post corner of J. B.'s land and the testator's home place", if there are in fact two such corners, is a latent ambiguity, and therefore not a subject of legal direction — but a pure question of fact for the Jury.

To remove a latent ambiguity, circumstances indicative of the testator's affections towards the object of his bounty, or the relative circumstances of his connexions, or his acts and declarations in respect to the thing given, or the person of the donee, are constantly admitted. Whether the testimony of the scrivener that the testator *intended* a particular corner was competent, depended on whether the testator had said so, or whether it was the mere opinion of the witness. If it were only the latter, it would be rejected, but the facts on which it was formed would be received. So testator's acts and declarations that he meant a particular corner would be competent and powerful evidence.

The relative amount of the advancements and comparative value of the land dependent on the selection of the corner are evidence to bear on the equality, which in the first instance is presumed to have been the aim of the testator.

District Court of Allegheny County.***Fieri Facias No. 182, April Term, 1848.*****JOHN VANERNAN *for use of* MARY PARKER, vs. ELIZABETH & JANE COOPER.****MOTION TO SET ASIDE SHERIFF'S SALE OF LAND.**

1. General principles and practice of the Courts in setting aside Judicial sales.
2. A Sheriff's sale set aside after the acknowledgment of the deed, on the ground that after bidding a larger price for the property when first offered, it was struck down to the plaintiff at an adjourned sale for a less price.

Opinion of the Court by WALTER H. LOWRIE, Assistant Judge.

In the English practice we every where find the rule that the sale will be set aside, (the biddings opened is their phrase,) as a matter of course, merely on the tender of a proper advance on the biddings, on the applicant paying the costs of re-sale, 2 Smith Ch. Pr. 235. This may be a very proper rule in England, where, on account of the enormous cost of such proceedings, there is but little danger of the rule tending to discourage free competition or to encourage inattention in those concerned. But such a rule without great restrictions would be very inexpedient in this State, and I do not know that it has met with any favor in this country; though the same practice is sometimes very properly adopted where the sale is set aside for surprise on the parties interested, or where the inadequacy of price is so gross as to be evidence of surprise.

Sheriff's and other judicial sales are the legal means of effectuating certain remedies through the instrumentality of the Courts of Justice, and the Courts should see that the sale is fairly and publicly conducted so as best to at-

tain the designed end. If it be a sale for the payment of debts, that object should be kept in view. And, while proper care should be taken not to discourage full competition by unreasonably setting sales aside, nothing unfair, underhanded or unconscientious, no undue advantage, no carelessness of officers, no exercise of power to the injury of the sale should for one moment be tolerated. *Veeder vs. Fonda*, 3 Paige 94. And the plaintiff, who with us has practically very great control over the sale, will not be allowed the benefit of any improper advantage given him by his position. See *Leisenring vs. Black*, 5 Watts 303.*

A judicial sale of land is a proceeding *in rem* under the direction of the Court for the benefit of all concerned; and all the parties interested in the *thing*, (the defendants' title,) or having liens upon it, together with the purchaser, necessarily become parties before the Court as to all matters connected with the sale, and have a right to be heard, and are bound by the decision. 1 *Sugd. vs. Vend.* 65, *Requa vs. Rea*, 2 Paige 339, *Casamajor vs. Strode*, 1 Eng. Ch. Rep. 195, 8 Watts 280. The whole is a judicial proceeding, though merely clerical and executive in its character until sanctioned by the Court by allowing the deed to be acknowledged. It does not conclude the title of any one but the defendant, for it does not profess to act on any interest but his, and there may be a hundred owners, or his interest may be only a fancied one. Nor should it have any wider effect, for as there is no actual taking

*The case of *Black vs. Leisenring* may properly be cited for the *obiter* remarks of the judge, the soundness of which we do not remember ever to have heard questioned. But there is a defect in the proceedings of the Supreme Court which strips the case of all pretensions to the dignity of a *judicial decision*. The facts are entirely mis-stated in 5 Watts 303, and the opinion, through some unaccountable means, was predicated upon an *imaginary case* directly contrary to the record returned on the writ of error. It was so wide a departure from the question raised that the Court below, upon the second trial, was forced to disregard it as totally inapplicable to the case, and to *direct a verdict, as before, for the defendant*. The cause was never moved afterwards.—ED. AM. L. J.

of the thing into the custody of the Court, no one can be presumed to have notice of the proceeding except parties and privies to the action—the defendant and lien creditors.

But on the interests of the parties before the Court it acts conclusively. The plaintiff in the action and the purchaser are parties by their own acts. The defendant and lien creditors are parties by necessity—from their relation to the property. This relation requires them to take notice of all authorised process in reference to the thing in which they are interested. And, perhaps, this is the principle upon which the various decisions upon the effect of the acknowledgment proceed, though it may not anywhere distinctly appear.

Thus an acknowledgment before the return day of the writ is void and no title passes, *Murphy vs. M'Cleary*, 3 Yeates 405, *Glancy vs. Jones*, 4 id. 212; for the same reason, I suppose, that a judgment before the return day of the summons is void—because the party was not before the Court at the time of the acknowledgment, and had no opportunity of being heard.

So of a sale after the return day of a *fi. fa.*, *Cash vs. Tozer*, 1 W. & S. 519, because (formerly) the sheriff had lost his power to act, and the parties have notice only of what he may legally do. So also of a sale under void process, or a satisfied judgment, *Burd vs. Dansdale*, 2 Binn. 80, *Fetterman vs. Murphy*, 4 Watts 424, *Hoffman vs. Strohecker*, 7 ib. 86, *Gibbs vs. Neely*, id. 305. 1 Watts & S. 528.

But as fraud vitiates almost all sorts of proceedings, so it vitiates a sheriff's sale even where the parties have due notice of the sale, if they are not themselves parties to the fraud, for men may not hide their fraud even under the cover of a judicial record, and this objection may be made even after the acknowledgment of the deed. If the purchaser is guilty of any fraud in relation to the sale, he

may lose his title without being refunded the amount of his bid, 2 Watts 66, 354, 4 id. 424, 7 id. 305, and to some extent this is true even in case of constructive fraud, 5 id. 303. The employment of puffers is a fraud upon the purchaser, and it is said he may resist the payment of the price even after the confirmation of the deed, 2 Browne 346. So perhaps where the purchaser joins in an unfair combination to depress the sale, 1 W. & S. 128. These last, however, can usually be discovered in time to be made an objection to the acknowledgment, and in such case, perhaps, should be. If any of these frauds are discovered, even after the deed is confirmed and before delivery, I do not know why they cannot be made a ground of setting aside the sale on motion, without the need of a formal trial. Nor do I see any thing to prevent the court from interfering even after the deed has been delivered, if the money still remains in court undistributed. However, I waive this for the present.

It seems to me that, where the purchase is not tainted with any fraud, all objections not showing that the parties are not before the court, must be taken advantage of at the acknowledgment of the deed, or before the title is finally passed under the action of the court. Such are the cases where the purchaser asks for relief for defect of title, or others for inadequacy of price, 5 Serg. & R. 223, 9 id. 156, 397, 11 ib. 134, 6 Watts 140, or where there is an irregularity in the sheriff's proceedings, 1 Watts & S. 528, 8 Watts 280, 1 Bald. 246, 2 Yeates 387, or where there is a misdescription of the property or its improvements, 1 Rawle 155, 4 Wash. C. C. R. 45, 1 Watts & S. 533, 9 Watts 482, 9 Serg. & R. 162, 4 Yeates 203, or where several tracts are sold together, 2 Yeates 516, 18, 1 Binn. 61, or for mere clerical errors, 1 Serg. & R. 92, 111, 2 Dall. 93, 3 Watts 87, 4 ib. 416, or for variance between the writ or levy and the deed, 1 Rawle 155, or oth-

er irregularity of process, 1 Bald. 246. All these are cured by the acknowledgment of the deed, for they are all done under authority, and therefore the parties interested are bound to take notice of them, and make their objections before their interests are finally acted upon, and the purchaser has irrevocably parted with his money.

These grounds for setting aside judicial sales are abundantly sustained by the decisions of other courts. Thus where the sale would under the circumstances operate as a fraud on some of the parties, whether so intended or not. *Jackson vs. Sternberg*, 20 Johns. 49; and see 1 *Browne* 187, or where the party complaining has been misled by the acts of other parties, or of the officers, or even of third persons, *Tripp vs. Cash* 26 Wend. 143, *Williamson vs. Dale* 3 Johns. Ch. R. 290, *Collier vs. Whipple*, 13 Wend. 224, *Mulks. vs. Allen* 12 id. 253, 2 *Paige* 339, or for surprise or misapprehension alone, where the interests of the parties are seriously affected, *Cook vs. Mancius* 3 Johns. Ch. R. 424, *Ontario Bank vs. Lansing* 2 Wend. 260, *Seaman vs. Riggins*, 1 *Green's Ch. R.* 214, or where the quantity, quality, limits, or improvements are materially misdescribed, 3 *Paige* 94, *Laight vs. Pell*, 1 *Edm.* 577, *Gower vs. Gower*, 2 *Edm.* 348, or where the purchaser is led to understand that he is to get a good title, and it turns out otherwise, *Morris vs. Mowett*, 2 *Paige* 586, *Seaman vs. Hicks*, 8 id. 656, and see *Anwater vs. Mathiott*, 9 *Serg. & R.* 397.

These have all been sanctioned as sufficient grounds for setting aside judicial sales, and it is said that these grounds operate with especial force where the plaintiff is the purchaser; for, the purpose of the writ being to collect the plaintiffs debt, it is said (per Senator Verplanck, 26 Wend. 156,) to be a claim of strict justice to allow a resale upon terms that will secure the plaintiffs claim, and this is es-

pecially proper where the plaintiff exercises control over the process.

And the fact that the party complaining was present at the sale does not estop him from making these objections, though he may for this reason be held to stricter terms than otherwise. He may be required to stipulate for a larger advance on the resale, and to pay the costs of one sale, or even to pay his bid or part of it into court. The whole subject of opening biddings may be found treated of at large in 2 Smith Ch. Pr. 235, 2 Hoffman's do. 145, 2 Dan's do. 1465, Hoffm. Masters in Ch. 223, Sugd. Vend. c. 2. s. 2.

In this State the requisition that the party shall bind himself to procure an increased price on the resale is not unusual; though the order as to the costs is most probably omitted on the principle of *de minimis*.

I cannot think that there is any difficulty in applying these principles to the case before us. Here the plaintiff is the purchaser. When the property was first set up the plaintiff was the highest bidder, at the price of \$310.—Then the plaintiff had the sale adjourned, and the next bidding the plaintiff became the purchaser at \$25. It needs no reasoning to show that such an exercise of the plaintiff's power cannot be sanctioned either for his own benefit or for that of another. If the plaintiff adjourns the sale on his own bid, he cannot withdraw his bid, and go on with the sale after he has by his own act got clear of other bidders. The defendant's property and the liens of creditors are not thus at the mercy of the plaintiff. There are, I think, other sufficient circumstances in this case to set aside the sale, but I choose to put the case simply on what I have stated.

But here it is objected that the money is paid, the writ returned, an al. fi. fa. issued, and the deed acknowledged, though not delivered the by sheriff; and it is said that,

with the acknowledgment of the deed, the power of the court is exhausted.

That the money is paid does not affect the question, for the purchaser is bound to pay so soon as the land is struck down to him. *Scott vs. Greenough* 7 Serg. & R. 199. *Negley vs. Stewart* 10 id. 207, *Davis vs. Baxter*, 5 Watts 515. And how can the court properly take the acknowledgment of the deed until officially informed of the sale by the return of the writ? And it is the practice of this court not to do it. The act of the purchaser (the plaintiff) in issuing the al. fi. fa. can surely not affect the question.

The whole objection then is that the deed has been acknowledged. It is said that after the deed has been acknowledged the title has completely passed *in rem judicatam*, and is beyond the power of the court. If this is true as to sheriff's sales, it is intensely more severe, in a case of very summary proceeding and with mere constructive notice to the parties, than the rule is in other cases where the notice is actual. For other defaults, even with actual notice, the power of the court is not thus restricted. The proceedings are considered to be still under the power of the court (even where the default is under an act of assembly and not under a rule of court,) at least until the other party has received the fruit of his judgment. And it is well known that the injustice of a contrary practice had much to do, in old times, in giving rise to the absurdity of a Court of Chancery to correct the injustice of the judgments of other courts.

If the argument be true, then the court cannot after the acknowledgment interfere with any part of the proceedings. The bed is made for the parties and they must lie in it. Purchaser, defendant, and lien creditors are without further remedy. Though the name of the purchaser, or of the defendant, or the description of the property, or all be wrong, yet the deed must stand as it is with all its ab-

surdities—no amendment can be made anywhere. Such seems to me to be the result of the argument, but such is not the practice. *Rapin vs. Dealy*, 1 Miles 339, *McCormick vs. Mason* 1 Serg. & R. 97, *Cluggage vs. Duncan* id. 111, *Owen vs. Simpson* 3 Watts 87, *Jones vs. Gardner* 4 id. 416. I do not think that *M'Cullough's case*, 1 Yeates 40, and *Blair vs. Greenway* 1 Browne 218, favor the argument as to the effect of the acknowledgment; for in those cases, or the facts are apparent, in aid of the acknowledgment, as reasons why the court *would* not, rather than *could* not interfere.

Though it is sometimes said that the title passes by the acknowledgment, and though for some purposes, it does pass of *as of that date*, yet it is not completely vested until the purchaser has received his deed. *Scheerer vs. Stanly* 2 Rawle 276, *Robbins vs. Bellas* 2 Watts 359. The acknowledgment is the sanction of the sale by the court, and the authority given by the court to the sheriff to deliver the deed. And surely this authority is revocable until executed, as most other delegated authority is. The *thing* has not yet passed out of the control of the court while it is in the power of its officers; and the parties interested may still be heard in relation to it. Such I have always understood to be the practice in this State, and it is more especially so where the plaintiff, the purchaser, is still in court seeking to collect the balance of his judgment.

When we examine the practice of other tribunals we find principles at least as broad as this recognized and acted upon. And it is important to notice that in Chancery the money is usually paid and the deed delivered before the sale is confirmed, so that after the confirmation, nothing remains to be done in passing the title.

Yet the practice of setting aside sales after confirmation is perfectly familiar—where the facts show a fraud
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upon the lien creditors, 20 Johns. 49, or where the debt was misled by the acts of the purchaser, 26 Wend. 143.— And in this last case the plaintiff was the purchaser, and had resold to an innocent purchaser at a profit; but he was compelled to credit the defendant with the profit of the resale. So where there is a mistake in the deed, 1 Cowen 220 (1 Miles 339) or material mistake in the description of the property, 2 Edm. 348, or other injurious mistake, misrepresentation or fraud, 2 Har. & Gill. 346, 5 Yerger 240, or where there has been an office confirmation after notice of intention to move to open the biddings and before opportunity to do so, 2 Smith's Ch. Pr. 244, 2 Sim. & Stu. 608. And generally wherever there is fraud in the purchaser, or fraud in some other person of which it would be against conscience for the purchaser to take advantage, or other circumstances that render the sale unconscientious. *Morrice vs. Bishop of Durham*, 11 Ves. 57, *Prideaux vs. Prideaux* 1 Bro. C. C. 287, *Scott vs. Nesbit* 3 id. 475, *White vs. Wilson* 14 Ves. 151.

It seems to me, therefore, both on principle and authority, that under the circumstances of this case, the acknowledgment of the deed presents no obstacle in the way of setting aside the sale. In an ordinary case of surprise for want of knowledge of a duly published sale, we should perhaps impose upon the complaining party the costs of sale and the burden of a stipulation for an increased bid. But the equitable plaintiff, the purchaser, is sister of the defendants, and I am much inclined to the opinion that she intended no injury *to the defendants*, by the sale of their land at this grossly inadequate price.

Let the acknowledgment of the Sheriff's deed be rescinded, and the sale set aside. The plaintiff, on application, can have the return of the sheriff, and the al. fi. fa. amended according to the altered state of the proceedings.

High Court of Chancery.

In Chancery, March Term, 1849.

ELYSVILLE MANUFACTURING COMPANY vs. THE OKISKO COMPANY.

1. The receipt in a deed acknowledging the payment of the consideration money may be contradicted, and under what circumstances.
2. A person who has received a certificate of stock in a manufacturing corporation, in consideration of the conveyance to the company of real estate, is not allowed to recover the consideration, as unpaid, on the ground that the sum required by the charter was not paid on each share of stock at the time of subscription. The other members of the company having advanced large sums of money which were expended for the common benefit on the said real estate, the holder is estopped from raising the objection to the subscription to the stock held by himself.

In this case, as reported for the *Maryland Free Press*, the following statement of facts is given :—

The bill in this case alleged that, on the 20th August, 1846, the complainants executed to the defendants a deed of certain property, lying partly in Howard district, and partly in Baltimore county, for the sum of \$25,000; that the defendants had taken possession thereof, and peaceably occupied the same ever since; that, although a formal acknowledgment of the receipt of the purchase money was written on the deed, it had never in fact been paid; and that the defendants were threatening to sell the same without regard to the rights of the complainants. The bill prayed for an injunction to restrain the defendants from selling; and also, that the property might be sold under the direction of the court, to satisfy the complainant's claim.

The answer denied that the said purchase money was still due, and in explanation stated, that in the month of July, 1845, the Elysville Manufacturing Company, consisting of the five Messrs. Ely, the owners of the property

in dispute, being in want of means to conduct their operations, agreed with certain merchants in Baltimore, that if the latter would join with them and contribute the sum of \$25,000, the company would convey to the association thus formed, the said property, and in consideration thereof, hold a like sum of \$25,000 in the capital stock of the association thus formed; that the sum proposed was raised, in pursuance of the agreement; that this association was afterwards incorporated by the name of the Okisko Company; that the Elysville Manufacturing Company by Thomas Ely, its President, subscribed for two hundred and fifty shares of the capital stock, amounting to the sum of \$25,000, as shown by an agreement filed with the answer; that the subscribers, other than the complainants, paid for their stock in cash, and that a certificate for two hundred and fifty shares was delivered to the complainants on the execution of said deed, and by them received as the true and only consideration therefor.

A great deal of testimony was afterwards filed in the cause, and exceptions to its admissibility were taken and argued at the hearing of the motion to dissolve the injunction, the nature of which will appear from the Chancellor's opinion.

As to the statement in the answer that the consideration money of the deed had been paid in stock, Chancellor JOHNSON said:

“It is the undisputed law in this State, that the receipt in a deed, acknowledging the payment of the consideration money may be contradicted; that it is only *prima facie* proof, and is exposed to be either contradicted or explained by parol evidence; and in this respect constitutes an exception to the general rule, which protects written evidence from the influence of such testimony, Higden vs. Thomas, 1 H. & G. 139; Wolfe vs. Hauver, 1 Gill 85.

But, although the receipt in the deed acknowledging the receipt by the vendor of the consideration may be disproved by parol, and an action maintained by him for the purchase money on the production of such proof, still it is insisted that the opposite party, the vendee, is held to the proof of the consideration expressed; and that he will not be allowed to support the instrument, by setting up a different consideration repugnant to that expressed.

In the case of the *Union Bank vs. Betts*, 1 Har. & Gill 175, the Court of Appeals decided that where a deed was impeached for fraud, the party to whom the fraud is imputed will not be permitted to prove any other consideration in support of the instrument.

The consideration offered to be proved in that case was marriage, and the attempt was to set up marriage as the consideration, in lieu of the money consideration expressed; but this was decided to be inadmissible, the deed being impeached for fraud. The proof, if admitted, would have changed the deed from one of bargain and sale to a covenant, to stand seized to the use of the grantee. In the case of the *Union Bank and Betts*, the disproof of the consideration expressed had rendered the deed fraudulent and void as a bargain and sale, and by admitting the parol proof offered, this void instrument would have been re-established as an instrument of a different character.

In every subsequent case decided by the Court of Appeals, the case of the *Bank and Betts* is explained in this way: that is, as having decided that when a deed is rendered inoperative and void by disproving the consideration expressed in it, evidence of a different consideration will not be received to set it up, *Clagett and Hill vs. Hall* 9 G. & I. 91. *Cole vs. Albers and Runge*, 1 Gill 433.

But the question presented in this case is of a different description. This deed is not impeached for fraud, as in the case of the *Union Bank vs. Betts*, and *Cole vs. Albers*.

and Runge. The complainants in this case maintain the validity of the deed, and seek, upon the allegation that the consideration money has not been paid, to enforce its payment by the assertion of the vendor's lien. And the question is, whether in a court of equity he can be permitted to assert this lien and compel payment in this way of the consideration expressed in the deed, if it appears by the evidence that he has been satisfied for the purchase money, by receiving something else as an equivalent therefor.

In the case of *Wolfe vs. Hauer*, 1 Gill 84, which was an action of assumpsit, to recover the value of lands sold and conveyed, but not paid for, objection was made to the admissibility of parol evidence to disprove the acknowledgment in the deed; but the court admitted it upon the ground, that such acknowledgment was only *prima facie* evidence, and the plaintiff, the vendor, obtained the verdict and judgment. In that case as here, the deed was not impeached for fraud, nor was the evidence of non-payment offered to render it inoperative and void; and the Court of Appeals says: "the introduction of the evidence proposed to be offered, neither changes nor affects any right transmitted in the property conveyed by the deed; it operates no change in the legal character of the instrument, nor in any manner affects injuriously any part of the deed, as a conveyance; the receipt of the purchase money is no necessary part of the deed, as it would in every respect be as valid without it as with it."

The deed then being valid, and passing the legal title; and the bargainer therein not impeaching it as fraudulent, but claiming the aid of this court to enforce his lien as vendor, to recover the purchase money expressed in it, the question is, shall he be permitted to do so, if upon the evidence it is shown that he has received, not in money, but in something else of value, what at the time he considered as an equivalent for the money?

Suppose, in the case of Wolfe vs. Hauver the defendant, the purchaser, could have shown that he had paid, and the plaintiff had received, as an equivalent for the two thousand dollars, (the consideration expressed in the deed,) merchandize or other property; and that such was the agreement of the parties at the time the contract for the purchase was made? Can it be possible, that under such circumstances the complainant could have been allowed to recover a judgment for the purchase money? If he could, where would be the defendant's redress for a wrong so monstrous and palpable? If he could not defend himself at law, because he could not in the face of the deed prove any other than the payment of the monied consideration expressed, he would be equally defenceless in equity; because the rules of evidence in regard to explaining, or varying, or contradicting written evidence, are the same in both courts; and thus the court must unavoidably be the instrument in inflicting the grossest injustice.

If in the case now under examination, the consideration of the deed from the complainant to the defendant, instead of being, as is alleged, twenty-five thousand dollars of stock in the Okisko Company, had been the conveyance by the defendant to the complainant of real estate of the same value, and each deed had been upon a money consideration expressed, is it possible that upon a bill filed by one of the grantors, claiming the enforcement of the vendor's lien, this court must have given him a decree for a sale of the property, upon proof that the monied consideration expressed, had not been paid? And that the other vendor must in like manner proceed upon his equitable lien to recover his money, which in case of any serious deterioration of the property, from any cause, might be impossible.

The question in such a case would not be, whether a deed shown to be fraudulent and void, by disproving the

consideration expressed, could be set up by evidence of a different consideration ; but whether a party asking the assistance of the court to enforce the payment of the purchase money, had *in fact been paid*. And whether paid in money, or in something which he agreed to receive as money, cannot be material.

I am therefore of opinion that the evidence is admissible.

It is said, however, that though the evidence may be admissible, there is no sufficient proof to establish either the agreement set up in the answer, or a valid subscription binding the complainant, the Elysville Manufacturing Company, to the stock of the defendant.

With regard to the agreement, that the complainant would convey to the defendant the property in the deed mentioned, in consideration of receiving twenty-five thousand dollars of the capital stock of the defendant, I am persuaded that a reasonable doubt cannot be entertained.

There is in the record a mass of evidence upon the point, both oral and written, which in my judgment irresistibly conducts the mind to the conclusion ; and many of the well authenticated and admitted acts and declarations of the parties can be accounted for upon no other hypothesis. It would be tedious and useless to recapitulate the evidence upon which this conviction rests ; and I content myself with saying, that after listening with much attention to the comments of counsel, and carefully reading the proof, I am unable to see how it is possible to arrive at a different result.

The only remaining question relates to the validity of the subscription by the complainant to the capital stock of the defendant. The subscription *in point of fact*, by the President of the former company, is not denied ; nor is it denied that at or about the time the deed was delivered to the defendant, the Attorney in fact of the complainant,

by whom the delivery was made, received from the defendant a certificate for the stock, and that this certificate has never been returned to the defendant since.

The validity of the subscription is however questioned upon two grounds; first, because the President of the Elysville Company, by whom it was made, was not authorized to make it. And secondly, because the ten dollars on each share, required by the 8th section of the charter of the defendant, to be paid at the time of making the subscription, were not paid in money.

In urging the first objection it is said that a corporation aggregate must act collectively, and by vote or resolution. But though this may be true, it is now well settled in this country, that the acts of a corporation evidenced by a vote, written or unwritten, are as completely binding upon it, and as full authority to its agents, as the most solemn acts done under the corporate seal; and that promises and engagements may as well be implied from its acts, and the acts of its agents, as if it were an individual, *Angel on Corporations*, 60, 127, 128.

In the case of the *Union Bank vs. Ridgely*, 1 H. & G., 426, the Court says, "that the same presumptions arise from the acts of corporations as from the acts of individuals; consequently that the corporate assent, and corporate acts, not reduced to writing, may be inferred from other facts and circumstances, without a violation of any known rule of evidence."

And again, in *Burgess vs. Pue*, 2 Gill 254, the Court says, "a vote or resolution appointing an agent, need not be entered on the minutes, but may be inferred from the permission or acceptance of his services." "And that acts done by a corporation, which pre-suppose the existence of other acts, to make them legally operative, are presumptive proof of the latter."

Such being the law upon the subject, and it being quite

competent to this court, without the production of an express authority from the Elysville Corporation to its President to make the subscription in question, to infer it from other acts, I am clearly of opinion, that the facts and circumstances of this case are quite sufficient to warrant the inference—the fact of the receipt of the certificate by the agent of the complainant—its retention to the present time, so far as the record informs us, and that the stock has been voted on two occasions by an officer or member of the corporation of the complainant, are acts which presuppose the existence of the other acts, to wit : The authority to the President to make the subscription.

The other ground upon which the validity of this subscription is assailed, is that the ten dollars, required by the 8th section of the charter to be paid at the time of subscription, have not been paid.

It may be remarked upon this objection, that it is taken by a party who holds a certificate for the stock subscribed by him, and has held it for upwards of two years. That in consequence of this subscription, and the conveyance of the property, made by such party, the other members of the corporation have advanced large sums of money upon their subscriptions, which sums have been expended upon the property now attempted to be affected by the vendor's lien ; and that if the efforts of the vendors are successful, the moneys so expended may be entirely lost to the associates of the vendors. The attempt therefore, as it seems to me, is destitute of any support in equity.—It appears to be quite apparent, that if these vendors had not subscribed for the stock, and executed the deed of the 20th August, 1846, the other members of the corporation would not have advanced their money. The subscription was not only made, and the deed executed, pursuant to the agreement of the parties, but there has been, so far as the record discloses, an entire acquiescence

on the part of the vendor, from that time until this bill was filed, in September 1848; and not only a passive acquiescence, but an active participation on the part of the vendor in the affairs of the corporation, by attending and voting at the corporate meetings. There do not appear to be any grounds for doubting, that until this bill was filed, the defendant considered the complainant a stockholder in the corporation; and that the money of the other corporators was expended upon the faith of that conviction; and my impression is, that conviction on the part of the defendant, was a natural result of the conduct of the complainant.

The case relied upon by the complainant's counsel in 1 Caine's Rep. 381. *The Union Turnpike Company vs. Jenkins*, is entirely unlike this case in some of its most essential features. In that case, which was an action of assumpsit brought by the Company against the defendant to recover certain payments called for, pursuant to the act of incorporation, the Court decided that the payment of ten dollars on each share, required to be paid at the time of subscribing, was essential to the consummation of the contract; and that without such payment the Court was at a loss to see any consideration for the promise to pay the remaining instalments. The subscription and payment were both regarded as necessary to perfect the contract. That unless the concurrence of both could be shewn, the defendant could not be regarded as entitled to the rights of a stockholder. And the Chief Justice remarked, that if the speculation had been an advantageous one, and before the first call of the President and Directors the stock had risen considerably in value, they could have refused to consider the defendant as a stockholder, on account of his not having made the payment required by the act, at the time of subscribing. This want of mutuality, therefore, was the ground upon which the defend-

ant was held not responsible for the payments called in. This constituted the want of consideration necessary to maintain the action.

But this case is not all like that. Here, the Elysville Company have received a certificate for the stock subscribed by its President, and have executed a deed to the defendant, of property, as the equivalent for, and in payment of the stock. The contract, therefore, is no longer executory, but is an executed contract on both sides ; and the attempt here is, not to resist the performance of an executory agreement, upon the ground that some act was not done, essential to give it legal validity ; but to cancel and abrogate a contract carried into full and complete execution by both parties. Suppose in the case referred to the defendant had paid up the instalments as they were called in, and had received a certificate for the stock ; would it have been possible for him, or the company, thereafter to repudiate the subscription upon the ground that he did not pay the ten dollars at the time of subscribing ? It seems impossible to suppose that this could be done ; and yet such is the effort here on the part of this complainant. After paying as agreed upon ; receiving a certificate for the stock ; attending and voting at corporate meetings ; and acquiescing for upwards of two years, during which large sums of money are expended by the other subscribers, an effort is made to repudiate the whole proceeding and recover back the consideration paid. I think this cannot be done, and shall therefore dissolve the injunction ; and the decision of this motion necessarily disposes of the petition* filed the third of March last."

*The petition referred to was filed by the complainants, stating that the property in dispute was lying idle and unused, and was going to decay, and praying that it might be sold, and the proceeds of sale deposited in Court, to abide the issue of the cause.

USURY LAWS.

"If a man is *compos mentis*, why should he not be allowed to give and receive any price he thinks fit, for money, as well as for any other article? and why should the legislature scrutinize the terms of a private contract for trade between individuals, if they are competent to manage their own affairs? It will scarcely be said that the same necessity for such enactments exists at this day, that called them forth in earlier times. In other words, that we have made no advance in the science of trade: that the infant state of commerce requires the fostering care of legislation: that the lawyers, doctors and farmers, who principally make the sum of our legislators, knew better what is for the advantage of the mercantile interests, than do the merchants themselves; and, lastly, that our merchants must be restrained and prevented from cheating and robbing each other.

"What, then, after all, is the effect of our usury laws? It embarrasses business, keeps up the rates of interest, *usually paid*, induces a laxity of principle among the people, in respect to the obedience of our laws, and, in fact, offers a premium for unfair dealing. It checks the exercise of enterprise, and throws a stumbling-block in the way of commercial advancement."

[Coppinger's Usury Laws.]

Recent English Decisions--Court of Exchequer.

BOOSEY vs. PURDAY — 26TH APRIL AND 5TH JUNE, 1849.

A foreigner has no copyright in works published by him at common law or by statute, and the assignee of a foreigner, although a British subject, stands in the same position as the assignor.

This was an action to recover damages from the defendant for the infringement of the plaintiff's copyright in ten airs of the opera *La Somnambula*. At the trial before POLLOCK, C. B., at the London sittings after Trinity Term last, it appeared that Bellini, the composer, had, in February, 1844, assigned his copyright, according to the Austrian laws, to Ricardi of Milan, who, in June, 1844, assigned them to the plaintiff in

England. The plaintiff then registered the airs in pursuance of the international copyright act of 1842. Nine of the airs were published at Milan and Paris at nine o'clock in the forenoon of June 10, 1831, and about two hours later in London, and the remaining air in London in June 1831, and at Milan in August, 1831. The Lord Chief Baron directed the jury that the plaintiff had not established an exclusive right to the copyright in the nine airs, but had as to the tenth. Verdicts having been returned accordingly, cross rules were obtained to set aside the verdict on the ground of misdirection.

Cur. adv. vult.

By THE COURT.—The case of *D'Almaine vs. Boosey*, 1 Y. & C. 289, in which Lord Abinger, C. B., held that foreign authors were entitled to copyright in their publications in England, and might enforce it, is not satisfactory. Such copyright must be acquired by statute, as none exists at common law, and in looking at the preamble of the statute of Anne, it appears that it was "to encourage learned men to compose and write useful books," for the improvement of the citizens, it must be presumed, of this country, either by birth or residence. A British subject who becomes the assignee of a foreigner, has no better title than the assignor, and has therefore, no copyright, and the publishing abroad simultaneously makes no difference in the question.

Nisi Prius.

[Before Mr. Justice ERLE.]

VIRTUE (a pauper) v. PAINTER.—23^d JANUARY, 1849.

FALSE IMPRISONMENT—REASONABLE AND PROBABLE CAUSE.

In an action for false imprisonment upon a charge of felony, the question of malice is for the jury, but the question of reasonable and probable cause is exclusively for the judge to determine.

The plaintiff, a cabman, was found at ten o'clock at night in a yard where he was accustomed to come to hire cabs, harnessing his horse to a cart belonging to the defendant, and the defendant gave him into custody, upon a charge of attempting to steal his cart. The plaintiff suing in *forma pauperis*, brought an action for false imprisonment. Upon the proof of these facts, Erle J., left it to the jury to say if the defendant had been actuated by malice, and intimated his opinion, that if the defendant had

reason to believe the plaintiff intended to steal his cart, there was no ground for supposing he was influenced by any malicious motive. The jury, after some discussion, found that the defendant was actuated by malice, and gave the plaintiff a verdict with 10*l.* damages.

EARL, J., said—He had left all that he ought to the jury, and then came the question of reasonable and probable cause; and that was for him. As at present advised, it seemed to him there was reasonable and probable cause. The plaintiff must, therefore, be non-suited, but with leave to move to enter a verdict for the plaintiff, if the court should be of opinion there was an absence of reasonable and probable cause.

Plaintiff non-suited.

HON. CHARLES MINER.

This distinguished citizen has issued an address to the Bench and the Bar of Pennsylvania, the object of which is to correct certain alleged inaccuracies in Judge Huston's late work on the Pennsylvania Land Titles. We have known these distinguished gentlemen so long, and esteemed them so highly as able and zealous friends and co-laborers in the great struggle in defence of the rights of the settlers under the Connecticut title, that Mr. Miner's address was read with surprise and pain. It is evident, however, that the statements in Judge Huston's Law Work, were not made with any intention to do injustice to the amiable and enlightened author of the History of Wyoming. When we have leisure and space we may take occasion to speak of the *Connecticut Question*, as connected with the land titles of Pennsylvania. In the mean time, we present our readers with the following article, which is annexed to Mr. Miner's recent publication. It is inserted for the purpose of showing that the notion that Courts of original jurisdiction have no right to decide constitutional questions, is a heresy of recent origin. It will be perceived, from the following, that in 1802 Judges Yeates and Brackenridge, in a criminal case, submitted the constitutionality of the "*Intrusion Act*" to the Jury.

[From the Luzerne Federalist of May 10, 1802.]

REPORT OF THE INTRUSION CAUSES.

WILKES-BARRE, MAY 6, 1802.

"On Monday last, the Hon. Supreme Circuit Court of this State commenced their session for the purpose of trying the Intrusion causes, which have been depending in the Quarter Sessions since the last August term.

The Hon. Jasper Yeates and the Hon. Hugh H. Brackenridge, Esq's presided as Judges.

On Tuesday the cause of John Franklin, John Jenkins, Elisha Satterlee, and Jos. Biles, was before the Court. The three first were charged in the indictment with "combining and conspiring to convey, possess and settle lands in this County since the 11th of April, 1795, under titles not derived from this commonwealth," and the latter with surveying and laying out townships contrary to the intent and meaning of the intrusion act.

The counsel engaged for the Commonwealth, were Messrs. Duncan, Sitgreaves, Smith, Hall, and Bowman;—for the defendants, Messrs. Dick, Evans, Griffin, Welles, Walker, and Huston. After the testimony on the part of the commonwealth was heard, Mr. Dick opened the cause, addressing the Court in a lengthy speech on the constitutionality of the law on which the indictments were founded. He was answered by Mr. Duncan, who was replied to by Mr. Evans. Mr. Sitgreaves then made some observations on a particular point of law, when Mr. Griffin closed the arguments in behalf of the defendants, and Mr. Dan Smith for the Commonwealth. There being a disagreement in sentiment between the Court, Mr. Brackenridge (the junior Judge) addressed some very pertinent observations to the jury; he recapitulated the principal arguments advanced by counsel, and independently gave his opinion that the Intrusion law was unconstitutional; he informed them that they were competent to decide on its constitutionality; that if they conceived it to be unconstitutional, it was their duty to declare it, and the indictment would of course fall to the ground.

Judge Yeates then addressed the jury.—He used several arguments in support of the constitutionality of the law, and also informed the jury it was their province to decide on its constitutionality. He called into view the principal points of the testimony of the different witnesses, and pointed out to the jury the facts which must govern their decision.

The jury returned a special verdict in which they found the facts against two of the defendants, Franklin and Jenkins, subject to the opinion of the Court upon the question of the constitutionality of the Intrusion law. The Court—being divided in opinion, no judgment was passed—but the final decision of the cause was deferred to the next session of the Supreme Circuit Court in Luzerne County, which will probably be held during the next spring. Satterlee and Biles were acquitted by the jury. The Court then ordered a *nolle prosequi* to be entered in the case of all those gentlemen who were under recognizances for their appearance, the counsel being conscious of the defects in the indictment for intrusion. And their recognizances were taken for their appearance at the sitting of the Quarter Sessions to be holden in this County in August next."

THE HON. CHARLES HUSTON.—This distinguished Jurist is no more. He was an able and eloquent advocate and an upright Judge. He was for a number of years President of the Common Pleas, and was appointed in 1826 an associate Justice of the Supreme Court, which office he continued to hold until the expiration of the time prescribed by the amended Constitution of 1838. Shortly before his death, he had completed his work on the Land Titles of Pennsylvania.

THE
AMERICAN LAW JOURNAL.

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JANUARY, 1850.  
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Authentication of Wills.

The following argument on the question whether a will may not be authenticated by the *mark* of the testator is from the pen of THOMAS WILLIAMS, Esq. of Pittsburg. It was presented as his argument, before the Supreme Court in the case of *Greenough vs. Greenough*, at September term, 1849. The decisions in *Cavatt's* appeal, *Assay vs. Hoover*, *Hays vs. Harden*, and *Barr vs. Grabill*, which hold a testator in making a will to greater strictness than would be required from the same man in the execution of a *deed* of conveyance, are deeply regretted; and the desire of the Legislature to remedy the inconveniences resulting from the doctrine established by those decisions, produced the act of 27th January, 1848, declaring that all wills *theretofore made*, to which the testator had made his *mark or cross*, should be deemed valid. But we do not look with favor upon this exercise of power by the Legislature. The decisions made in *Satterlee vs. Matthewson*, *Mercer vs. Watson*, and other similar cases, have the merit of sustaining acts of Assembly, passed in support of equities arising from the payment of money upon the footing of a deed on contract. *Underwood vs. Lilly*, and *Menges vs. Wertman*, were also cases in which the acts of Assembly which were sustained, confirmed an equitable title arising from the actual payment of money to the use of the party

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who endeavored, against good conscience, to hold both land and money. But an act of Assembly which attempts to render valid, as a will, an instrument of writing which the law, in its highest expounding forum, has pronounced void, stands upon a footing entirely different from that which sustains the cases referred to. So far as it operates upon cases in which the death of the alleged testator occurs after its passage, it destroys no vested right and may therefore stand without serious objection. But an act of Assembly passed after the death of the ancestor, and after the law has cast the inheritance upon his heirs, which without any equitable consideration to support it raises up an invalid instrument, and makes it valid, as a will, is in effect destroying vested rights.—It is taking one man's property and giving it to another; and would seem to stand under similar condemnation with an act to legitimate children after the death of the parent, which has been condemned as taking away the vested rights of the legal heirs. Indeed, after the decision in *Dale vs. Medcalf*, we do not see how the act of 27th January, 1848, can operate in cases where the decedent expired before the statute was enacted.

[ED. AM. LAW JOURNAL.]

The questions presented in this case are whether a will executed by a mark is sufficient, within the act of 1833; and if not, whether the act of 1848, declaring such execution sufficient by retrospection, is constitutional?

That the present will is not executed in conformity with the recent interpretation of the act of 1833, may, perhaps, be admitted. That this interpretation is however in strict accordance with the past understanding of the provisions of that act, or with any thing that had been previously determined, either here or elsewhere, in relation to the signification of the terms upon which its construction has been made to turn, or with any sound rules of construction or criticism, may, I think, with all possible respect for the opinions of this Court, be very seriously questioned.

The terms of the act of 1833 are, that "every will shall be in *writing*, and, unless the person making the same shall be prevented by the extremity of his last sickness, shall be *signed* by him at the end thereof, or by

some person in his presence and by his express direction," &c.

The phrase, "signed by him at the end thereof," has been interpreted to mean *subscribed with the name* of the testator, and this too upon the ground that the act must receive a strict construction, in order to avoid that laxity which has led the English courts into a substantial repeal of their Statute of Frauds.

The first remark which this reasoning suggests, is, that it involves a departure from the rule which favors the alienation of property by devise, as well as the other equally well settled rule, which extends a liberal indulgence to the last solemn act of a dying man, and looks for his intentions, without regard even to his words, on the humane presumption that he may be *inops consilii* at the period of its execution. The rigor of interpretation, which has been heretofore confined to the transactions of the strong, is now transferred to the testaments of the feeble, and an interest in lands may pass by an article of agreement, made on the fullest deliberation, with the signature of a cross, while the same mark, at the end of a last will and testament, and under a statute with precisely the same phraseology, is held to be no signature at all!

Admitting, however, the propriety of the rule which requires a literal adherence to the terms of the statute, how would the present case stand under its application?

The verb "to sign" signifies, according to the best lexicographers, "to *mark* with characters, or with one's name." This is its present acceptation, and it may doubtless, in common parlance, mean either the one or the other. In strictness, however, the former is the more correct definition, because it is the more literal. It is, indeed, the original and primary signification of the word. The etymology of the term, corresponding as it does with the practice of earlier times, when either the seal or the sa-

cred symbol of the cross, the emblem of the christian faith, was adopted alike by the learned and unlearned, as if to add the sanction of religion to the evidences of their contracts, proves it to be so. In the latter and more modern sense of a subscription, it is derivative, and to some extent perhaps figurative. It has come, in the progress of time, to be applied to that which is not, properly speaking, a *mark*, or in the sense of the Romans, a seal, but not however, to the exclusion of its original and appropriate use. It is still employed in the liturgy of the Anglican church in its primitive signification. It occurs, in other instances in our statutes, and has never, so far as I am advised, been interpreted to mean any thing else, and I suppose it would even yet be holden in the courts of Pennsylvania, that the averment of a signature to a contract was well satisfied by the proof of a *mark*, whether it were a written cross or a *printed character*.

That such is the sense in which it has always been understood by the courts and the profession in that country from which our language as well as our laws have been for the most part derived, will scarcely be denied. There has, indeed, been no period in the history of English literature or law wherein the word has not been so used, or wherein it has been doubted that a mark was a sufficient signature, either to a deed or to a will, and no evidence of the legitimacy and universality of this notion could be stronger than the fact that when the question of the sufficiency of a seal in the latter case was first started, it was settled by the summary argument that the party might unquestionably have made his mark, and that as a seal was substantially the same thing, it was of course equally operative as a signature. 3 Lev. 1.

It may be said with truth that the same idea prevails with equal universality amongst ourselves. In the case of a deed or an executory agreement in relation to lands,

under our statute of frauds, nobody has ever thought of questioning the sufficiency of a mark. In the case of a will the impression has been the same. There is no case, I think, in our reports, until the era of Cavatt's appeal, wherein it has ever been hinted that a mark was not a sufficient signature to any instrument of writing whatever. The term has, on the contrary, been invariably so understood by the Supreme Court of this State.

Thus in the case of *Dunlop vs. Dunlop*, 10 W. 155, the mark was called a *signature*, and no objection made to the will except on the score of the unconsciousness of the testator, which it would have been unnecessary to consider, if the mark had been supposed at that day to be no signature. And yet this case was decided as late as 1840. So too in the case of *Stricker vs. Groves*, 5 Whart. 397, which was decided about the same time, Judge Rogers remarks, in delivering the opinion of the Court, that although the testator was disabled in his hands, "there was nothing to prevent him from authenticating the paper by his *mark*."

Nor is this understanding confined to the period referred to. It still prevails in the Supreme Court, as is shown in the case of *Hays vs. Harden*, 6 Barr 411, decided only two years ago, where it is assigned as a reason for admitting the proof of the hand writing of the subscribing witnesses, "that the will of a *marksman* who had attested it by the number of witnesses required, would inevitably be destroyed by the death of either of them," although in the case of *Asay vs. Hoover*, reported in the previous volume, it is declared that a mark is insufficient under any circumstances !

There is more emphatic testimony however, as to the common understanding, in the remarkable fact that the Judges of this Court, even in the more recent cases, and while in the very act of repudiating the original signifi-

tion of this term, betray unconsciously their own sense of the popular and professional understanding thereof, by borrowing in almost every instance, an additional phrase, in order to convey the idea which they have so recently annexed to it. Thus in *Cavatt's* appeal, the Court say that "the case is deficient in the evidence necessary to show"—not that it was "*signed*" by the decedent, in the language of the statute—but "that the decedent's *name* was signed." So in *Asay vs. Hoover*, 5 Barr 21, "the true construction is," not that the testator must "*sign*" in the words of the act, but "that he must sign *by his own proper signature*." So, too, in *Hays vs. Harden*, 6 Barr, the Chief Justice says that "to the provisions of 32 and 34, H. 8, and the act of 1745, the statute has added another, partly borrowed from the English Stat. of Frauds, that it be signed at the end thereof "*with the name of the testator by his own hand,*" &c., which is, by the way, an addition which the Legislature has not thought proper to make, and which, if it adds nothing to the law, was not required for purposes of explanation.

The like phraseology is moreover employed by the counsel for the plaintiff in error in the present case, by way of explaining *their* meaning. Thus in the first paragraph of the third page of the printed argument, they say, "when the testator does not sign *his own name*, &c.," and in the next following paragraph they hold precisely the same language.

These remarks are quoted for the purpose of showing that we do not differ as to the popular signification of the word; that when the Judges of this Court wish to convey the idea of an *autograph subscription*, they find it necessary to superadd the words "his name" to the word "sign," in order to render themselves intelligible. If the word "signed" implies, *ex vi termini*, a *subscription of the name*, the superaddition is manifest tautology. If it does

not, allow me to ask, with all possible respect, what authority there is for the interpolation — whether such a dealing with the law is to be considered strict construction, and whether it does not in effect amount to legislation?

But this novel interpretation is justified on two grounds: First to avoid the looseness of construction which has prevailed in the English Courts; and secondly, to preserve the characteristic mark of the testator. I propose to examine them in their order.

The well settled rule of interpretation, as applied to statutes, is to look to the old law, the mischief and the remedy. Let us apply this test to the examination of the present question.

The history and reasons for the enactment of the present law are to be found in the report of the Commissioners on the Civil Code, made to the Legislature in 1832. They say in that Report that the framers of the act of 1705 copied only parts of the statute of 29 Charles II., omitting the forms of execution entirely, and that under the construction given to it, a paper was held to be a good will without signature, seal or attesting witnesses — and although not in the hand-writing of the testator. They remark moreover that the introduction of forms is not suited to the genius of our citizens; that they were not satisfied that it was necessary to require so many formalities as were prescribed by the Statute of Charles II.; but that thinking some mode of authentication necessary, they suggest the *signature* of the party as the just medium between the extremes of the English Statute and our act of Assembly. For the purpose, however, of indicating the precise mischief, they proceed to say that the principal source of litigation had arisen out of the uncertainty in respect to the *intention* of the testator, and that whether the design was *complete in itself* often remained a

problem, because *the signature of the testator was wanting*. They put then also, by way of illustration, the case of a devise of a single tract of land by a man who had several tracts and several children, without a signature or subscribing witness, and suggest as a remedy "the simple expedient of requiring the signature of the party *on the ground that it would show conclusively that it was a complete and finished act, and thus assimilate it to all other entire and concluded documents.*"

But this is not all. The same reason precisely for the alteration in the law is suggested by Judge Gibson, in the case of *Hays vs. Hardin*, 6 Barr, 411, where he says that "the mischief was that as it was unnecessary for the testator to have *adopted* the instrument *after it was finished*, or to have put *the finishing stroke* to it himself, it followed that memoranda for preparing a will, or rough drafts of *unfinished* dispositions, or indeed any scrap of testamentary type found amongst a dead man's papers, might be admitted to probate. To correct this, the Statute of 1833 enacts, &c. To the provisions of 32 and 34 H. 8, and the act of 1705, it added another, partly borrowed from the English Statute of Frauds, that it be signed at the end of it *with the name of the testator by his own hand*, or in case of necessity by the hand of some person expressly appointed by him." The words in italics are, as already remarked, interpolated by the Judge. They do not occur in the Statute itself.

The case may then be stated in a few words. The *old law* permitted a writing to be proved as a will without any signature at all. The *mischief* was that it might be a mere inchoate purpose, an incomplete, imperfect, and unexecuted intention. The *remedy* was to require a mark at the bottom, to show that it was a complete and finished act, and this was to be a "*signing*," as before, but *at the end* of the instrument, in order to secure that object.

Now it is to be remarked that the construction of the word "signed" under the British Statute was well understood by the framers of this law; that no complaint is made of the insufficiency of a mark, or the abuses which might flow from it, although the practice was known to be general throughout this State, and that instead of substituting the term *subscription*, or something equivalent, in imitation of the successful example of the Legislature of New York, (26 Wend. 341) in the place of the long periphrasis of a "signing at the end," as they would doubtless have done in that case, they adopted the precise language of the Statute, settled as it then was, with the mere super-addition of the phrase, "at the end thereof," to correct the very mischief suggested by themselves, and admitted by Chief Justice Gibson to have constituted the reason of the enactment of the law. The interpretation now given however by the Supreme Court to this phrase overlooks and entirely disregards the sound and safe elementary rule already referred to, goes far beyond the mischief, and operates as a surprise upon the people by entirely changing the well-known, and universally authorized and accredited signification of the verb "to sign."

Then as to the importance of the characteristic mark which the subscription of the name is supposed to furnish.

If it were true that the character of the hand-writing would present a safer test than the *mark*, it might furnish an argument for the interference of the *Legislature*, in case the latter had proved to be productive of fraud, and become a subject of complaint. It would be no sufficient authority, however, to the Courts, for altering the signification of words, and putting into the Statute by construction what was not there already.

But it would not have the effect contemplated by the Court. The Statute requires the signature of the testa-

tor or some other person in his presence, and by his express direction, unless prevented by the extremity of his last sickness. This means either that the testator may sign *at any time*, by the hand of another, or that he may do it only *in extremity*. If the former be the correct interpretation — and such is admitted in Cavatt's appeal to be the true grammatical construction — then there is no security at all from that quarter. If the latter, then the unlearned man cannot make a will at all, except *in extremis*.

But has not the importance of the characteristic mark been greatly over-rated? Does it afford any additional security? Is it so peculiar in its features with men who are not much in the practice of writing, as to be provable in even a majority of cases with any degree of certainty? Or does not the main security against imposition consist at last in the witnesses with whom the Statute has surrounded the bed-side of the sick and the dying, for the purpose of attesting the instrument? The Legislature intended no more than that the proof should be clear and morally conclusive — that the paper set up as a will was indeed the finished testament of the dying man. The provision was not introduced with a mere view to identification. The mechanical act of signing was intended for no other purpose than as an additional and unmistakable index of a deliberate and settled purpose, an entire consciousness of what he was doing, and an absolute freedom from all undue constraint.

If it be true, however, that the signing *with the name* is so imperatively required for the sake of the characteristic mark, what will be said of a case wherein the hand-writing of the testator is illegible, or a case wherein he should think proper to employ a signature consisting of *printed letters*, or the hand-writing of another man? Either of these would be as sufficient signing under the Statute of Frauds, but would not be good in the case of a will, al-

though it would be unquestionably a signing with *his own proper name*.

The first of the contingencies suggested has already occurred in the case of *Hays vs. Harden*, reported in 6 Barr, 412. There the name of the testator, who was never known to have written on any former occasion, was so entirely illegible, that the learned and sagacious Champollion himself could have made nothing out of it, and that it amounted in substance to no more than a mark. I have referred already to this case, for the purpose of showing that a mark is there distinctly admitted to be a sufficient signature. I quote it again to show an equally distinct admission that the object of the Legislature was not to secure the signature of the name as a characteristic mark. The Chief Justice says, in the course of his opinion (page 412) that "no one ever thought that proof of the signature of the party is indispensable. The will may be proved by *circumstantial* evidence doubly attested. Where the testator has called witnesses to attest it, his will shall not be frustrated by circumstances he could not prevent, merely because to proof of the hand-writing of the witnesses there cannot be added proof of his own."

The case just referred to is the last which is to be found in our books upon this question. If, however, it is not to be considered the law, it suggests, at least from its peculiar circumstances, that the question of *signature* may come to be one to be settled by *writing masters*, rather than by *lawyers*, and that it may have to be decided by and by precisely *how well* a man must write in order to enable him to make a signature and a will at all. Should the signature, however, be legible to one man and not to another, it might involve another curious point of inquiry, as to who was to be the arbiter, and whether the question belonged to the province of the Court or that of the Jury.

It is worthy of remark, moreover, because it is materi-

al in the present instance that the case just quoted substantially over-rules the case of *Dunlop vs. Dunlop*, and others which have followed in the same track in regard to the necessity of express and positive proof of a *previous* direction, or the insufficiency of a subsequent ratification. It decides that a will may be proved by "circumstantial evidence, doubly attested." In this view, however, the marking and acknowledgment would be clearly evidence to authorize a Jury to infer a previous direction—a principle which is essential to the security of those who claim under the wills of illiterate men, because not one subscribing witness in twenty, after the lapse of years, would be likely to recollect the direction itself.

It seems to me, then, that the positions that the use of the mark was not one of the *mischiefs* intended to be remedied by the act of 1833, that the object of the Legislature was not to secure in all cases where it was practicable the evidence which the subscription of the name was supposed to afford, and that they did not therefore intend to use the word sign in a new and exclusive sense, are made out by evidence approaching as nearly to the character of demonstrations as any mere proposition in morals will conveniently admit, if the repeated declarations of the Supreme Court itself are to be taken as authority.

Supposing, however, that I should have failed to make out these propositions, the next and last question to be decided is whether the act of 27th January, 1848, declaring that all wills theretofore executed to which the testator's name is subscribed by his direction and authority, or to which the testator hath made his mark or cross, shall be deemed and taken to be valid in all respects—provided the other requisites under existing laws are complied with—is constitutional?

I think it is obvious that whatever the law may now be, after the decision in *Hays vs. Harden*, it is at least suffi-

ciently apparent that until the case of Cavatt's Appeal, which was decided in 1844, it was almost universally understood that a mark was a sufficient signing under the provisions of the act of 1833—that the case referred to was a surprize alike upon the profession and the people—and that if Elizabeth Greenough, the testatrix, had taken the best professional advice in the State at the time of making her will, she would have been told that it was well executed. If that case, however, changed the law as it had been previously understood, it was clearly competent to the Legislature to restore it to its original and well understood meaning.

The case appears to be in all its circumstances strongly analogous to that of *Satterlee vs. Matthewson*, 16 S. & R. 169. In that case it had been previously decided (13 S. & R., 133) that the rule of law which prevents a tenant from contesting the title of his landlord, did not apply to the case of a Connecticut claimant. The Legislature interfered at the next session by creating the relation of landlord and tenant between the parties, so as to bring the case within the rule, and the act was pronounced constitutional. The ground taken by Judge Huston, in delivering the opinion of the Court, was that the previous decision involved the adoption of a new rule; that "a retrospective decision of a Court in the application of a new and unheard of rule by which to determine past contracts, is as objectionable as a legislative provision"—that if adopted on the score of policy, it does not mend the matter—that the Court have the power to rescind a rule, even on the second trial of the same cause, if they find it to be a bad one, and that if they might do so, the Legislature might *a fortiori* do the same thing, because their power is superior to that of the Court. This reasoning applies with great force to the present case, and it seems to me decisive of the question, if it be sound.

The act is good, however, upon another principle. It is a *confirming* act. It was intended to cure an *informality* in the execution, which was supposed to avoid the will—and it is settled by repeated decisions that such acts are constitutional. Thus in *Underwood vs. Lilly*, 10 S. & R. 101, it was held that an act of Assembly confirming an erroneous judgment under which the title of the plaintiff was divested, was constitutional, and the Court there say that “such acts are not uncommon, and are very useful,” and that “retrospective laws which only vary the remedies, divest no right, but *merely cure a defect* in proceedings otherwise fair, *the omission of formalities, &c.* these and such like acts are clearly constitutional.” So in *Barnet vs. Barnet*, 15 S. & R. 72; *Tate vs. Stoolfoos*, 17 S. & R. 33; and *Mercer vs. Watson*, 1 W. 357, it is ruled that acts of Assembly curing defects in the acknowledgment of deeds by *femes covert* are constitutional. Other causes without number are to be found to the same effect, among which is that of *Menges vs. Wertman*, 1 Barr, 223, wherein a Sheriff’s sale, which was utterly void, was made good as against the heir. See also *Smith vs. Marchand’s Ex’s*, 7 S. & R. 260, *Estep vs. Hutchman*, 14 S. & R. 435; *Bleakney vs. Bank of Greencastle*, 17 S. & R. 64, and *Walter vs. Bacon*, 8 Mass., 472.

That the present is a mere case of *informality*, I think cannot be doubted. The mode of signing is unquestionably one of the “formalities” attendant upon the execution, and it is so treated by the Commissioners in their remarks upon the bill. If the law pays respect to the substance—and certainly all it aimed at was to secure the evidence of a deliberate intent and a complete execution, and not to throw insurmountable obstacles in the way of a devise—the manner of execution is nothing but mere *form*. If it was considered, however, more important that the testator should subscribe his name, than that he

should be allowed to dispose of his property in his own way, then, and then only, would it be matter of *substance*.

The case seems to me to stand, in this view of it, upon the same footing as that of *Mercer vs. Watson*, wherein it was stated that the principle settled before the statute, was, that the conveyance was not void, but that the grantee had failed to produce the requisite proof of the execution—that the act dealt not with the contract but with the evidence, and that the party complaining had but a vested right in the quality and effect of the testimony. . If it had been provided that the mark accompanying the name should be understood to import a compliance, or that, in other words, the direction to write the name should be presumed from the fact of attestation, as was ruled in *Hays vs. Hardin*, or from direct proof of the marking and acknowledgment, which was adjudged insufficient in *Cavatt's* appeal, it would have presented the same circumstances precisely. And yet in effect it does no more.

The case of *Mercer vs. Watson* moreover decides in accordance with the principle laid down by Judge Huston in *Satterlee vs. Matthewson*, "the competency of the Legislature to declare the law retrospectively, so as to revise and overrule the decisions of the judicatory," a principle which, as the Chief Justice remarks, had been acquiesced in even by the dissenting Judge in the Supreme Court of the United States in the former case, and which he himself declares to be "broad enough to cover the whole case" which he was then considering. The same principle is also affirmed in *O'Conner vs. Warner*, 4 W. & S. 227, with a limitation, it is admitted, to cases wherein the Judiciary have not yet fixed the meaning of a doubtful law." That limitation is, however, expressly confined in its operation to the case of a *purchaser*, and then only to one who has *bought on the faith of a judicial*

exposition of the law. "Purchasers," says the Chief Justice in that case "have acted on their own interpretation of its meaning, and consequently on their own responsibility. They cannot, therefore, complain of violated faith given to the accredited act of a constitutional organ." In the present case it is true that the meaning of the law has been recently fixed in a particular way by the Supreme Court. They have done it, however, since the execution of the will, at which period it is not, I think, to be doubted that the law was differently understood by the Judges themselves. The plaintiff is not a *purchaser* but a *volunteer*. He has invested nothing upon the faith of this exposition, which has but divested the rights acquired by others under a different exposition, and conferred them upon him. If a third person had purchased under these circumstances, it would scarcely, even then, have presented a case for the application of the rule laid down in *O'Connor vs. Warner*.

But it is objected that the act of 1848 interferes with a vested right. There is some difficulty, however, in determining what is meant by these terms. It is said in the case of *Tate vs. Stoolfoos*, 16 S. & R. 36, that "it is not intended by a vested right that it should be a right *to do wrong*—to take advantage of a mere slip *in form*, where the transaction is a bona fide one." In this view there is no such right in the present case with which it can interfere. In accordance, however, with the doctrine of *Mercer vs. Watson*, it was at best but a vested right in the quality and effect of the evidence.

Supposing, however, that such was its effect, it does not follow by any means that the act is unconstitutional. "In matters of civil jurisprudence," as is remarked by the Chief Justice in the case of *Mercer vs. Watson*, "statutes simply retrospective, have not been disregarded by the Courts, but for disobedience of some plain, palpable,

and pointed mandate of the Constitution," and in the same case, speaking of the act of Assembly curing defective acknowledgments by married women, he says: "although it did divest a right, it might not be unconstitutional." Thus in *Satterlee vs. Matthewson*, and *Menges vs. Wertman*, the acts of Assembly involved did obviously interfere with rights of that description, and yet in the former case the act was held good on the ground of surprize, and in the latter upon the footing of the moral obligation.

It is true that retrospective Statutes disturbing vested rights have been generally and justly condemned on the principles of general jurisprudence. Thus in the Digest it is said, *nemo potest consilium suum mutare in alterius injuriam*, a maxim, by the way, as applicable to a Court as to a Legislature. The rights referred to, however, are what are called "*absolute vested rights*." The doctrine is not understood to apply to remedial Statutes which only confirm rights already existing, and in furtherance of the remedy by curing defects, and adding to the means of enforcing existing obligations—1 Kent, 455. "Such Statutes," he says, "have been held valid when clearly just and reasonable, and conducive to the general welfare, even though they might operate in a degree upon existing rights, as a Statute to confirm former marriages defectively celebrated, or a sale of land defectively made or acknowledged." He adds, moreover, that "the legal rights affected in these cases were deemed to have been vested, *subject to the equity existing* against them, and which the Statutes recognized and enforced."—*Ibid*, and see 4 Conn. 209; 2 Pet. 627; 2 Verm. 234; 8 Pet. 88; 2 Story 267.

The present case, however, was no more than a defective conveyance by the ancestor, and the rights acquired by the heir may be considered as having vested, not absolutely, but subject to the equity of the devisee under that

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conveyance. The intent of the testator may not be a sufficient consideration to raise an equity which a chancellor would enforce, but if the devisee is not a purchaser, neither is the heir, and it might well be permitted to the Legislature in a case so clearly just and reasonable, to give effect to an intention which has been frustrated either through their own obscurity in expressing their meaning, or the uncertainty produced by the language of the Courts.

The case of *Norman vs. Heist*, 5 W. & S. 171, which is relied on with great confidence by the counsel for the plaintiff, was one wherein an act of Assembly was passed, declaring a bastard child to be able and capable to inherit the estate of his mother. There, however, the act was merely held to be enabling and prospective, and the question of its constitutionality left undetermined. And it is worthy of remark that in that case the Courts say, that "the ancestor may have designed to die intestate, and gave the property in effect to his heirs by so doing." The Act was regarded as objectionable because it thwarted the apparent intent of the ancestor. Here, however, there was an undoubted intent to pass it away by will, and the act of Assembly merely confirms it.

I have only to add that the cases of *Bolton vs. Johns*, and *Dale vs. Metcalf*, are both cases of purchasers, and that as against the heirs there would have been no difficulty in either of them.

District Court of Allegheny Co., Pa.**COUNTY OF ALLEGHENY vs. THOMAS C. ROWLEY AND
OTHERS.**

Motion for an injunction to stop the carrying on of the excavation in Grant street, in pursuance of the new grade, to the great danger of the walls of the Court House.

APRIL 21, 1849.

Opinion of the Court, per LOWRIE, Justice :

Much reliance is placed by the Defendants upon the cases of *Green vs. The Borough of Reading*, 9 Watts 382; *The Philadelphia and Trenton Railroad Company*, 6 Whart. 45; *Coon vs. Monongahela Navigation Company*, 6 W. & S. 113; *Henry vs. The Pittsburg and Allegheny Bridge Company*, 8 W. & S. 85. But none of these cases go the length of the principle contended for here. In the *Reading* case it is apparent that there had been no previous regulation of the street, and that the plaintiff had built his house according to his own fancy, without asking that the corporation should first regulate the grade of the street. In the case of *Henry* against the *Bridge Company*, the question whether *Henry* had built on the faith of any previous regulation does not appear to have been raised; and perhaps, without this, such a case would not again be so decided.

It is true that, in the case of the *Trenton Railroad Company*, it is said that, in such cases, parties cannot complain of "consequential damages" not amounting to "taking" of private property; and this is repeated in the cases of the *Allegheny Bridge Company*, and *Monongahela Navigation Company*. But we should do great wrong to the opinions of the Supreme Court, if we

should adopt these remarks in all their latitude, irrespective of their special meaning in the cases to which they apply.

The case of the Railroad Company was a case of mere annoyance by the occupation of a part of a street for a railroad,—a case where damages could not have been received by any principle of common law, and only by virtue of clear and express enactment. The case against the Monongahela Navigation Company was also a case where the damages was of such a character that there was no remedy at common law, being strictly *damnum absque injuria*, and no remedy was provided by the statute, or, if there was, the statutory remedy was not pursued. Any expressions of the court seeming to assert anything beyond the requirements of the case before them, are subject to be modified and construed in accordance with the general principles and maxims of the law. And it should be observed that, in that case, one of the judges felt himself called upon to dissent from the latitude of the expressions used. In the case of the Bridge Company, the Court limit their language, as to exemption from liability for damages, to a case of damage, “unavoidably” arising from the doing of the work, and allow a recovery for “negligence and gratuitous injury.”

These cases, therefore, are not inconsistent, in their true principle, with those wherein the City of Pittsburgh was held liable for consequential damages for the negligence of its officers in making excavations in the streets, one of which was affirmed in the Supreme Court, though I have failed to find it in the books. They are the same in principle with the cases of *Hollister vs. The Union co.* 9 Conn. R. 436, relative to the improvement of the Connecticut river; *Lansing vs. Smith*, 8 Cow. 146, as to the Albany basin; *Spring vs. Russel*, 7 Greenl. 273, as to the improvement of the Saco River; and *Rex vs. Pegham*, 15

Eng. C. L. 237—all of these cases being decided upon the principle that the damage was of that *remote consequential* character not remediable at common law. 1 Denio 91; 466. 2 id. 433; 3 Hill 612; 11 Met. 55; 25 Eng. C. L. 634; 16 East 215; 15 East 372.

And even if there should be thought to be some incompatibility between the *cases* and the *principles* on this subject, what matters it? Human judgment must often fail in the application of principles; but the judge's duty is fully performed, if he has conscientiously and earnestly endeavored to be right. The law is not made up of *cases*, but of *principles*, and those principles still remain, even though, in particular cases, they have not been allowed their proper effect. There must always be a margin of doubtful territory along the confines of correlative principles, and cases may occasionally stray over the invisible boundary into a foreign jurisdiction; but there still remains a *jus postliminii*,—a right of return to their native citizenship.

It is said that consequential injuries to private property not amounting to a "taking" for public use, are not within the protection of the constitution; and the language of the Supreme Court in the cases of the Trenton Railroad Company and the Monongahela Navigation Company, is quoted in support of the assertion. But we do not ascertain the principles of the law or of any science by picking up detached sentences or opinions of its best professors. The language of the Supreme Court is, no doubt, accurate in its application to those cases, and we shall misunderstand it if we apply it to a case different in principle. It is merely saying that injuries of a character not remediable by the common law, or the law, as applicable between citizen and citizen, whether statute or common law, are not within the protection of the constitution against the public or its agents.

If it has any different meaning, it seems to me that it may have reference to that clause of the constitution which relates to corporations taking property for public use. Then it may be understood as declaring consequential damages, arising from public works, constructed by individuals or corporations, cannot be ascertained until the works are erected, and therefore cannot be within the protection of that clause of the constitution which requires payment or security before the work is done. I cannot say that the court intended anything of this sort, but the cases show that they had this clause of the constitution in their mind.

If either of these views is correct, then these expressions are not at all inconsistent with the provisions of the Bill of Rights, forbidding a man's property to be taken or applied to public use, without just compensation, and securing to every man a full remedy by due course of law for every injury done him in lands, goods, person or reputation, nor with the spirit of the United States constitution forbidding all laws *impairing contracts*. They are not at all inconsistent with the jurisprudence of other States, where it is considered that, by constitutional provisions similar to ours, private property is protected against all invasion, injury, destruction or diminution, without just compensation. 7 Mass. 394; 12 id. 468; 2 Johns. Ch. R. 436; 5 Cow. 175; 5 Wend. 423; 13 id. 372; 17 Johns. 185; 6 Rand. 245; 1 N. Hamp. 339; 4 id. 527; 5 Ham. 410. And here I may quote the language of the court in the case *ex parte Jennings*, 6 Cow. 525, where damages were allowed for the diminution of a private watercourse, by a diversion for the supply of the Erie canal, the court remarking—"individual property cannot be taken, or, which is the same thing, *individual rights impaired*, for the benefit of the public without just compensation. Such is the language of the common law and of the constitution.

It would be derogating from the justice of the Legislature to suppose they would stop short of providing for compensation in such a case."

In relation to our own State, I know of no ground for charging the Legislature with such injustice. The constitution designs to furnish a full and honest protection to private rights, and, so far as I have observed, the Legislature have so construed it and honestly regarded it.— Even in the cases of the Trenton Railroad Company, and Monongahela Navigation Company, full provision is made for all damages, as well direct as consequential, which the law regards as such; in the Railroad case the remedy being for injury and damages sustained by reason of said Railroad." Acts 1831-2 p. 92.

The particular injury complained of in the case of *Coon vs. Mon. Nav. Co.* appearing not to have been provided for, the Legislature immediately corrected their error. Acts 1844 p. 390. The same honest provision for all legal injuries is found in the law relating to the Harrisburg and Pittsburgh Turnpike road, Acts 1805-6 p. 357, which may be called the pattern act, its form being followed in most others. Also in the laws for constructing the Pennsylvania Canal. Acts 1825-6 p. 57. And in all acts authorizing public improvements, which I have examined, of which I refer to a few. Acts 1827-8 pp. 132, 301. Acts 1846 p. 320. Acts 1847 p. 34, and 1848, pp. 572, 580.

I find, therefore, no proper ground for supposing that, in our state, the constitutional protection of private rights is less regarded, by either the courts or the legislature, than it is elsewhere.

It would be a monstrous doctrine, that individuals and corporations are liable for no consequential damages arising from the execution of a power granted by act of legislature, except such as are provided for in the act. I know

of no difference in degree between statutory and common law rights. Both are equally entitled to protection. In the exercise of either, proper regard must be had for the rights of others. The claims of neither can rise above the natural rights of man secured by the constitution.

It is a consequential injury, if I overflow my neighbor's land by a dam erected on my own land, and it is not less remediable, whether I claim to do it at common law or under a statute. It is a consequential injury, if I divert, by a drain on my own land, a watercourse naturally flowing through my neighbor's, and a statutory license would be but a cobweb shield against the justice of the constitution.

It is true that acts of assembly are sometimes passed authorizing public improvements, in which it is omitted to make full provision for injury to private rights. But, in such cases, the common remedies, existing between citizen and citizen in similar cases, remain, be they legal or equitable in form. If the statutory remedy be not complete, the ordinary remedies remain open to the suitor. 4 Eng. Ch. Rep. 378; 11 Ohio Rep. 408, 2 John. Ch. R. 162.

For this reason it is hard to imagine a case in which an act of assembly authorizing the taking of private property for public use can be unconstitutional, unless it positively attempt to take away the right to compensation. It can be no objection that the act provides no remedy, for the constitution provides it, by securing to the person injured the usual remedies applicable to such wrongs. It imposes upon the Judiciary the duty of giving full redress, and it would, perhaps, be more in accordance with the spirit of the constitution that a general remedy should be provided for all such cases, through the courts, than that special remedies shall be provided in each act which authorizes the improvement.

Are the plaintiffs without remedy because the defendants are acting under the authority of the city of Pittsburgh? In other words, may public corporations invade private rights, and the citizen have no redress? Certainly the constitution draws no such distinction, and intends no such immunity, even to the state itself. When the Supreme Court declared this city liable for the negligence of its agents in its improvements, and a township liable for injuries arising from bad roads, 5 W. & S. 545, they declared the true spirit of American rights, and sustained the enlarged principles of modern jurisprudence. And it may now be assumed that public corporations as well as private are responsible for wrongs done under their authority in the same manner as individuals, 4 S. & R., 16; 9 id. 101; 4 Eng. Ch. R. 378; 9 Conn., 436; 3 Hill N. Y., 612; 2 Denio, 433; 1 id., 91; 10 Ohio, 150; 15 id., 474; 4 Ham., 500; 1 id., 36; Wright, 603; 7 Mass., 187; Cowp., 86; 25 Eng. C. L., 634; 3 Wils., 461; 2 Wm. Bl., 924.

I observe that many English authorities are often cited in cases of this sort, to show that acts, of the character here complained of are not the subject of action; but generally they show no such thing; and yet I think they have had an unhappy effect upon many of the decisions in this country, when the constitutional protection has been overlooked. These cases do not justify the *act*, but the *person* performing it, because of his acting under the authority of parliament. But there, that authority is paramount, and the fault is not that of the officer, but of the government which enjoins the duty, and to it also can the citizen resort for redress. But, with us, the constitution is paramount, and the law which authorizes an invasion of private property, furnishes no protection against the right to demand, and the duty of paying the just compensation which the constitution secures, 4 T. R., 794; 6

Taunt. 29; 9 Eng. C. L., 227, 257; 32 id., 27; 17 id. 236; 13 East, 200.

Having thus disposed of the most serious objections urged by the defendants, it remains to inquire whether the act complained of is "contrary to law, and prejudicial to the interests of the community and to the rights of individuals."

It is not denied that the spirit of the law protects a corporation, or *quasi* corporation, such as the county of Allegheny, equally with an individual citizen. It will also be conceded that the destruction of this Court House would be prejudicial to the interests of the community.

Is then the act of cutting down the street, according to a new grade, without taking proper precautions to secure buildings erected on the path of the old grade, contrary to law.

I am not prepared to say that the power of the corporation as to fixing grades is exhausted by being once exercised, for there is great reason and high authority against such a conclusion, 6 Wheat. 503. It is true that the principle of the Cherry Alley case, 7 Watts 450, may, at first glance, seem to present an analogy against the power. But I think there is a manifest distinction between assuming possession of another's property, and the injurious use of one's own. One may misuse his own property subject to the proper penalty, while he is allowed no power at all over another's. The corporation may abuse its power over the streets; but it cannot shift these streets over upon private property, 4 Johns. Ch. R. 53. It may be estopped by its own settlement of the *lines* of the streets, yet not held to any particular degree or mode of *improving* them.

May the corporation, then, alter the grade without making compensation for the injury thus occasioned, or properly securing the buildings endangered by the alter-

ation? In other words, is such an act an invasion of private rights?

On this point it is not necessary to question the extreme decisions in favor of the right of digging on one's own land, on the maxim *cujus est solum, ejus est ab imo usque ad celum*. 12 Mass., 220; 10 Met. 371; nor to argue in favor of the *reasonable* use of one's own rights on the maxim, *sic utere tuo ut alienum non ledas*. 3 Camp. 398; 18 Eng. C. L. 45; 7 Watts 460; 4 Man. & Gra. 700; 17 Johns., 92; 8 id., 421.

By the common law, an ancient building, though built to the line, and ancient lights opening out upon the grounds of another, may claim to be protected from injury by any use of the adjoining land inconsistent with their enjoyment: 22 Eng. C. L. 205; 17 id. 483; 6 id. 528; 9 id. 221. It matters not whether these particular cases would be recognized here as law or not. It is the principle that I seek the use of; and that is, wherever a grant is proved, or is by law presumed to exist, the right possessed under it will be protected; and the party has his election, to proceed either in the common law or equity form: 3 Danl. Ch. P., 1859-1875; 2 Story Eq., §926-958; 3 Eng. Ch. R., 49. And it may be safely said, that whenever a party can establish a grant of the privilege claimed, the court will interfere to enjoin against the infringement of the privilege, or to furnish the proper compensation: 3 Eng. Ch. R., 7; 11 id., 11; 8 Page, 351; 4 id., 169; 2 Ves. Sr., 453. And an injunction is a proper remedy against all improper exercise even of lawful authority of this character: 2 John Ch. R. 463; 4 Eng. Ch. R. 378; 1 Baldwin, 205; 7 W. & S., 107.

In the case before us, the fact that the Court House was built upon the faith of a regulation duly made, is, in legal contemplation, equivalent to a grant of the right to have the wall sustained by the street. according to that

regulation. It is a grant which cannot be revoked, without compensation for the injury sustained by the revocation. If the injury threatened is imminent, and not easily compensated in damages, the work must be stopped until proper means can be taken for securing the foundations, by underpinning the walls on the most approved plan.

Even if we are wrong in our judgment that the city has power to alter the grade once fixed, we cannot, in this case, we think, grant a perpetual injunction as the final remedy, on account of the delay of the County Commissioners in applying for it, until after a great part of the regulation has been executed, and many of the houses altered to suit it. 1 Craig & Ph., 91; 1 Swans., 250; 11 Eng. Ch. R., 11; 5 Ves. 638.

That the terrace wall will certainly fall, and at least, the portico with it, if the grading be completed is agreed by nearly all the witnesses. That the mischief is of that character, technically called irreparable, will not be disputed. *When* the catastrophe may happen, is of course, matter of conjecture; and certainly, we are not bound to await the actual test of the judgment of the witnesses. We cannot allow the danger to public business, and the lives of the citizens attending the various courts, to be increased by any further excavations, until further advised, or until the wall is properly secured.

It is for the representatives of the city and county respectively, to decide whether this cause shall proceed to a final adjudication in this form, or whether they will amicably agree, both as to the time and manner of carrying on the grading and securing the wall, and leave the question of damages to be settled in a common law form of action. If they should make no arrangement, the Court will have to determine, if required, how near to the wall the Corporation may carry on its excavations. In the meantime,

the plaintiffs can have an injunction to stay the excavation entirely, until answer and further order, on giving bail in \$2,000.

Messrs. TODD and FORWARD for the motion.

Messrs. SCULLY and SHALER contra.

Olcott v. Hawkins--In Equity.

In the District Court of the United States for the District of Wisconsin, having the jurisdiction of a Circuit Court.

THOMAS W. OLCOTT vs. WILLIAM HAWKINS.

Perpetual injunction in favor of Woodworth's patent for planing, tonguing and grooving boards, &c.

This case was heard upon bill, answer, proofs and exhibits; and was argued by Messrs. FINCH & JAMES for the plaintiff, and by Messrs. A. SMITH and PAYNE for the defendant. At a special term held at the city of Milwaukee, on the first Monday of April, 1849, an opinion, of which the following is the substance, was delivered by MILLER, Judge.

The bill represents that letters patent were issued to William Woodworth, in December, 1828; and were renewed to William W. Woodworth, as administrator of said William Woodworth (the patentee) deceased. That by an act of Congress, approved February 26th, 1845, the said patent was extended. This patent is for an improvement in the method of planing, tonguing, grooving and cutting into mouldings, &c., either plank or boards, or any other material; and for reducing the same to an

equal width or thickness, &c. For the purpose of planing &c. the plank or boards may be placed on, or against a suitable carriage, resting on a frame or platform, so as to be acted upon by a rotary cutting, or planing and reducing wheel; which may be made to revolve, either horizontally or vertically; and the cutters on this wheel are made to cut upwards from the reduced point of the plank to the said surface. After the board or plank passes the planing cylinder, and as soon, or as fast as the planing cylinder has done its work on any part of the board, or plank, the edges are brought into contact with two revolving cutter wheels, for the purpose of grooving and matching. The carriage, on which the board, or plank, are placed, may be moved forwards by means of a rack and pinion, by an endless chain or band; or by geared friction rollers.

Assignments and conveyances from W. W. Woodworth to the plaintiff, through sundry persons, "of all his right, title and interest, which the said W. W. Woodworth then had, in and to the said exclusive privileges within the territory of Wisconsin, to the number of thirty-one, are alleged and proven. Said assignments were recorded more than three months after the date of their execution.

The defendant, in his answer, denied having made and set up a machine; in all its material parts substantially like and upon the plan of the machine described in the bill and letters patent to Woodworth. He further stated that he constructed and put in operation a machine for planing boards, and is still using it; and that it is not a violation of the Woodworth patent; but in conformity to a patent to Robert Luscombe, for an improvement, &c. He admits that he did annex to his machine, machinery for tonguing and grooving, which is covered by the Woodworth patent. The patent to Luscombe consists of a moveable or receding face, which is to act in connexion

with a wheel, to which gouges and irons, similar to plain bits, are attached for the purpose of planing.

The patent act of July 4, 1838, ch. 357 §11, provides "that every patent shall be assignable in law, either as to the whole interest, or any undivided part thereof, by any instrument in writing; which assignment, and also every grant and conveyance of the exclusive right, under any patent, to make and to grant to others to make and use, the thing patented, within and throughout any specified part, or portions of the United States, shall be recorded in the Patent Office within three months from the execution thereof." The deed from Woodworth is a grant and conveyance to the grantee, his executors, administrators and assigns, of the exclusive right, under the patent, to make and use, and to grant to others to make and use the machine within and throughout the Territory of Wisconsin, to the number of thirty. It is more than a mere license; it is "a full consent, permission and license to him, his executors, administrators and assigns to construct and use thirty machines within Wisconsin; with authority to commence and prosecute to final judgment, any suit, or suits, for the infringement of said patent, within said Territory, accompanied with a covenant not to construct, or use, or give a license for such purpose, any machines, within the territory. The case of Woodworth & Bunn vs. Wilson, 4 Howard 712, is in point. The deed from Woodworth to Bunn is the same as this one, except that Bunn was authorized to commence and prosecute suits in the name of Woodworth, or in his own name. The Supreme Court decided that Bunn was an assignee of the exclusive right, within the territorial limits, described in his deed.

That part of the act, requiring deeds, or assignments, to be recorded within three months is merely directory; and except, as to intermediate *bona fide* purchasers with-

out notice, any subsequent recording of such papers is sufficient to pass the title to the assignee—*Brooks vs. Byam*, 2 Story's Rep. 525 ; *Boyd vs. Malpin*, 3 McClean R. 427. The defendant does not come within this exception. He does not pretend to be a *bona fide* purchaser without notice.

There is no doubt of the validity of the Woodworth patent. It has been sustained in several Circuit Courts of the United States, against, probably, every other machine constructed, in almost every variety of shape and form. The Supreme Court has sustained it ; and Congress, by a special act has extended it. It is considered a highly meritorious and important patent right.

The patent to Luscombe, for his improvement, cannot affect the plaintiff, if the defendant's machine is an infringement of the Woodworth patent.

Woodworth claims, "as his invention, the improvement and application of cutter, or planing wheels, to planing boards," &c. He describes how the several operations may be so combined as to plane, tongue and groove at the same time. The application of the planing cutters to planing boards, &c. together with the action of the other cutters constitute the invention. This invention consists of a combination of known mechanical powers, by which certain results are produced. This patent, by its terms, being for a new combination of existing machinery, or machines ; and not claiming any improvement or invention, except the combination, unless that combination is substantially violated, the patentee is not entitled to any remedy for the use of parts of the machinery. The enquiry is not whether any part of the combination has been used since the patent, but whether the whole combination has been substantially violated. *Prouty & Mears vs. Ruggles, et al*, 16 Peters, 336 ; *Barnet & Storms vs. Hall, et al*, 1 Mason Rep. 447 ; *Moody vs. Fiske*, 2 id.

112; Evans vs. Eaton, 3 Wheat. 454; Howe vs. Abbot, 2 Story's Rep. 190.

The principle of two machines may be the same, and their form or proportions different. Their external mechanism may be apparently different, and they may substantially employ the same power in the same way. The word "*principle*" means the operative cause, by which a certain effect is produced; the combination of certain mechanical powers; the mode of operation. Upon the question of *principle* we may arrive at a correct conclusion, by ascertaining what is the result which the invention is designed to produce. Whatever is essential to produce the appropriate result of a machine, independently of its mere form, is a matter of principle. By this combination, the board is planed upon its surface, tongued on one edge, and grooved on the other, by one operation. Now, where this is produced by a combination of the same mechanical powers, though the machines may be somewhat different in their structures, in principle they are the same. The frame rollers and matchers of these two machines are the same in principle. The only question is, whether the planing part of the defendant's machine is an infringement of the Woodworth patent. This is a point of some difficulty. It involves, like almost every one arising in patent cases, not so much general principles, as the minute and subtle distinctions which occasionally arise in the application of those principles.

The patent act contemplates two classes of persons as peculiarly appropriate witnesses in patent cases, viz: 1st, Practical mechanics, to determine the sufficiency of the specification, as to the mode of constructing, compounding and using the patent; 2d, Scientific and theoretic mechanics to determine whether the patented thing is substantially new in its structure and mode of operation, or a mere change of equivalents. The second is by far the higher and more

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important of the two. *Allen vs. Blunt*, 3 Story's Rep. 740. The court has been favored with the testimony of operatives and mechanics of intelligence ; but not sufficiently with that of experts, or men of science, which is generally necessary to a proper understanding of the principle involved. The witnesses speak generally of the planing wheels and of certain principles connected therewith : but do not enter into, either an analysis of those wheels from actual measurement ; or a mathematical demonstration of those principles, sufficient to satisfy a mind enquiring after truth.

The machine, as described by the witnesses, to have been constructed, according to the specifications accompanying the *Woodworth* patent, the axis of the cylinder is horizontal, and the knives are used in various forms ; and as the board passes under, and the cylinder revolves, the knives operate upon the principle of the adze. Upon the defendant's machine, the planing is performed by a wheel which turns upon an upright shaft with knives and gouges set in and on the edge of the wheel. The gouges on the edge of the wheel take off the the superabundant stuff, and the knives finish the work. The board passes to, and under the planing wheel, by the same means as the *Woodworth* patent.

The witnesses generally described the principle of cutting away the surface of the board upon the *Woodworth* patent to be that of an adze ; and the principle of the defendant's machine, to be that of a common plane traversing across the board, moving in lines parallel to the surface, which it finishes. They generally state that the two machines are different in principle. They speak in general terms of the dissimilarity of the machines, in reference to the cylinder and the wheel ; and the adze and the plane cut. Some of the witnesses state, that the bed plate in the *Woodworth* machine is intended to be a per-

fect level; and in the defendant's, is the fullest at the line the cutters travel over while performing their work, and in form is circular. Also, that the board is depressed after being planed, to avoid the back cut or lash. That at the point where the cutters strike, in the defendant's machine, the board is paralleled with the face of the wheel; and that it was necessary to incline the board to the face of the wheel; and that the part of the board planed is depressed. They have not given the court to understand whether the cylinder upon the Woodworth machine is a perfect cylinder, or not. If it is not, then the cut would not be strictly that of an adze. But be that as it may; if the disc of the defendant's wheel should not be exactly plane, but in the least dished, the appropriate motion of the adze is introduced. The same principle may be occasioned by adjusting the board to the face of the wheel, as described by the witnesses. And as the bed plate of defendant's machine is not level, but highest where the cutters act upon the board, although they may enter as planes, yet they assume the adze cut in leaving the board. The principle is the same, whether the knives cut upwards on a level board, or run level over a curved board highest at the point of action. When the board is straightened the shape of the cut is the same—not level, but grooved. In my opinion, at the effective moment, it is not the plane, but the adze cut that finishes the work. Upon the same principle is it, when the board is inclined to avoid the back lash, or cut. Nor does the action of the wheel necessarily determine the principle, or character of the cut.

I cannot see any essential difference, in principle, between defendant's machine, and those patented to McGregor and Ira Gay. Nor is there any essential difference, in principle, between defendant's wheel and a machine having knives extending from a perpendicular axis,

and constructed so as to avoid the back lash. All machines, constructed upon these principles, have been enjoined in different Circuit Courts. I am, therefore, of opinion, that the defendant's machine is, in principle, similar to the Woodworth patent; and that the whole combination, embraced by the Woodworth patent, has been substantially violated.

Decree, that the injunction be, and remain perpetual.

Supreme Court of Pennsylvania.

IN THE MATTER OF GROSS' ESTATE.

1. Where a bequest is to children as a class, children in existence at the death of the testator, are alone entitled, among which posthumous children are to be considered.
2. It will make no difference, in such a case, that the bequest is to children begotten or to be begotten.

HARRISBURG, MAY 22, 1849.

ROGERS, J.—The question involved in this case, arises on the following clause in the will of Geo. Gross. After making divers bequests and devises, provided thus: "The rest, residue and remainder of my estate not herein particularly given, devised and bequeathed, I do give, devise and bequeath unto the children of my brothers (except George and Martin Gross) and sisters, and the children of the brothers and sisters of my wife, formerly Elizabeth Illig, deceased, share and share alike, to them severally and their heirs and assigns forever."

It is very clear, from the terms of the will, that the objects of the testator's bounty were the children of his and

the quantity of their respective interests, viz : share and share alike. Affirmed.

Stouffer vs. Haines' Executors. Lancaster, C. P. COULTER, J. The suggestion of the possibility of a fact to the jury, of the existence of which there was no evidence direct or by inference, for the purpose of reconciling certain declarations and proofs on the part of the plaintiff, with the evidence given by defendant, is error.

Haines, subsequent to the date of the note sued upon, said he had a note cut-out by the bankruptcy of defendant, and denied he had a new note, as this one appeared. The suggestion allowed as possible was, that the note was given with an understanding that it was to be concealed, lest other creditors of Stouffer should press for new notes also. The existence of this understanding is not an explanation, but a *fact* susceptible of proof, and if proved leaving nothing in dispute. Reversed.

Administrators of Skinner vs. Bank of Gettysburg. Adams. ROGERS, J. Bank stock left as a legacy to the wife, is a chose in action, and if not reduced into possession by some action of the husband, does not pass to his assignees in bankruptcy. Nor is there any difference in this respect, whether the bequest be received before or after marriage.

But the stock transferred by the husband in trust, and directly after retransferred to the husband and wife, is such a reduction into possession as to bar the title of the wife, when he survived her. It indicates his intention, that in case she survived her husband, it should be hers; but if he survived her, that it should be his absolutely.

Study vs. Beiler. Adams. BURNSIDE, J. A plea in abatement after issue is too late.

A woman in pregnancy and near her confinement cannot be compelled to attend as a witness; and it is error in such case to reject her deposition. Reversed.

Snyder vs. Executors of Snyder. Adams. COULTER, J. In a bequest that after payment of the debts, all the testators real and personal estate should be sold by his wife, for her own proper use during her life, and then over, the wife takes such an interest as entitles her to hold against the creditors or executors of her second husband. Reversed.

Caldwell vs. Executors of Moore. Huntingdon. ROGERS, J. The owner of land at the time taxes are assessed upon it, is liable to the collector in the first instance, and to prevent circuity of action, resort may be had to him instead of the tenant. When the taxes were assessed in the name of the tenant, and the owner sold the land to a stranger who went into possession, and the collector levied and enforced payment from him, the executors of the owner will be liable to the purchaser, he having died in the mean time. Reversed.

Supreme Court of Pennsylvania.--Middle District.

ABSTRACTS OF CASES DECIDED AT MAY TERM, 1849.

Musselman vs. Eshleman. Lancaster, C. P. Burnside, J. Though a trustee executor or administrator cannot act as seller and buyer, yet a deed in such case is not absolutely void. It is voidable only; but no party to the deed, or others claiming under him, can avoid it. It is absolutely void only in case of actual fraud.

In this case there are no badges of actual fraud, or is it alleged. The guardian of the heirs of Musselman, or they, as they came of age might affirm or disaffirm the sale; but the statute of limitation will be a bar in ten years after the youngest child comes of age, where the defendant has been actually twenty-one years in adverse possession.

The cases that require twenty-one years after the heirs come of age, are cases of actual fraud where the deed is absolutely void. There the statute runs from the time of the discovery. Affirmed.

Fisher vs. Strickler. Lancaster, D. C. Rogers, J. A covenant "that we the said Jacob Strickler and Christian Strickler, have this day agreed with each other, that in case if one of them shall happen to die unmarried, or intermarried and without lawful issue or issues that should arrive to the age of twenty-one years, that then and in that case the survivor of them shall be the sole heir of the deceased one, both to the real and personal estate of the deceased, without any further deed or conveyance: to hold the real estate as well as the personal estate of the deceased unto the survivor, and to his heirs and assigns forever," is a covenant to stand seized to uses, and is not in conflict with the law, or policy of this State, as regards the collateral inheritance tax, or the dower of any future wife. Affirmed.

Estate of Geo. Gross. Lancaster, O. C. Rogers, J. A bequest unto the children of the testator's brothers and sisters, and the children of the brothers and sisters of his wife, "share and share alike, to them severally, and their heirs and assigns forever," is to the children as a class; and those only who are in being (or posthumous) at the time of the testator's death, can take. The words quoted do not make this an exception to the rule stated by C. J. TILGHMAN, in *Pemberton v. Parke*, 5 Bin. 607. The words are not intended to designate the persons who are to take, to control the general expressions, or to determine the time when the legacies are to vest; but are designed to indicate the manner they are to hold, and

Law Jour. 191, viz : that on the completion of a building erected by contract, the party walls are the property of the owner of the house, and not of the contractor; and that the latter is not entitled to compensation from the builder of an adjoining house, who makes use of the party walls erected by the first builder. The opinion of the Court was delivered by **FINDLAY, J.** citing *Dauids vs. Harris*, 9 Barr, 501. **BRIGHTLY** for plaintiff—**FAIRLAMB** for defendant.

Cox vs. WILLETTTS.—In this case, the Court of Common Pleas of Philadelphia county, sitting in equity, decided that they would restrain, by injunction, a builder from using his neighbor's party wall, before payment of a moiety of the cost thereof.* October 6th, 1849.

*Party walls in the city of Philadelphia are regulated by the act of 27th February, 1721, 1 Smith, 124; in the district of Southwark by act of 18th Apr.. 1792, 3 Smith, 134; in Moyamensing by act of 24th March, 1812, 5 Smith, 345; in Spring Garden by act of 22d March, 1813, 6 Smith, 40; in the Northern Liberties by act of 16th March, 1819, 7 Smith, 184; in Kensington by act of 6th March, 1820, Pamph. 58; in the district of Penn by act of 17th February, 1847, Pamph. 116; in Richmond by act of 27th February, 1847, Pamph. 183; in Bridesburg by act of 1st April, 1848, Pamph. 1849, p. 720; and in West Philadelphia by act of 5th April, 1849, Pamph. 409.

Supreme Court of New York

FIRST JUDICIAL DISTRICT.

[Present, JONES, Pres. Just.—HURLBUT, and EDMONDS, Justices]

GENERAL TERM, NEW YORK, Sept. 1849

Powell and others v. Striker, late Sheriff of Kings county. The steam engine, worms, tubs, and apparatus erected for the purpose of a distillery, and used therewith, but which may be removed without damaging the building, although not fixtures as between landlord and tenant, may be so as between the owner of the fee and a mortgagee.

In the latter case, articles purely personal in their character, and not indispensable to the distillery, are not fixtures.

Horatio N. Carr v. Lester D. Moore. On a contract for a sale of the good-will and furniture of a hotel, in which the several parties bind themselves to the performance, under pain of \$500; such sum is a penalty,

and not a measure of damages; and the vendor, never having surrendered or been disturbed in his possession, but retaining both hotel and furniture without change, his damages for the refusal by the vendee to perform are merely nominal.

Alexander C. Barry ads. *Voir Clirehugh*. The rule, that a bond given in restraint of trade is void, does not apply to a bond given by one who has pirated on a patent right to the patentee, conditioned that he will not, during the continuance of the patent, manufacture or vend in any place the patented article, or any thing in imitation thereof.

Craig & Dellicker v. *Samuel Cockroft*. A note promising to pay a certain sum "for value received, according to certain articles of agreement," is a valid promissory note, not payable on a contingency, or out of a particular fund; and the words "according to certain articles of agreement," relate merely to the consideration going to show the nature of the value received, and do not relate to, or in any way qualify the promise to pay, which is absolute of itself.

Jeremiah M. Wardwell ads. *Thaddeus A. Lawrence*. In an action by the lessee against the lessor, for breach of the contract of letting, in not permitting him to take possession pursuant to the lease, it is not competent evidence in respect to the damages that the lessee had been offered a certain sum for his lease.

Jacob Acher, Sheriff v. *Susan Ledyard*. A plea to an assignment of errors, which avers only evidence of a fact and not the fact itself, cannot require from a replication thereby, any more than a denial of the averment.

John Bacon v. *William H. Townsend*. In an action for malicious prosecution, for being arrested on a charge for a felony, the mere fact that the accused was discharged from the recognizance given by him on his arrest, is not a termination of the prosecution so as to warrant this action.

The question of probable cause, where there is no dispute as to the facts, is a question of law for the court to determine; and in such case it is competent for the court, at *nisi prius*, to order a nonsuit, on the ground that there was no want of probable cause.

Robert Prince ads. *Joseph Doncourt*. In a case where goods are left with a party, under circumstances which do not necessarily imply a right to claim compensation for storage, if, upon a demand of the goods, the party having possession absolutely refuses to deliver them, without saying any thing about his claim to storage, he will be regarded as having waived his claim. It is only in cases where the right to compensation for storage is a matter well understood by both parties, such as warehouse keepers and the like, that such a refusal would not be a waiver.

Andrew S. Garr v. *David Selden*. Words imputing to a professional

man want of skill or ignorance in a particular case, are not *per se* actionable. To be so, they must have been spoken of him generally. But words imputing want of integrity are actionable *per se*, whether spoken of him generally, or in reference to a particular transaction.

Where the words imputed are declared on as having been uttered under circumstances which might render them privileged, they will not be so held on demurrer, where the declaration also avers that they were used maliciously, and were not pertinent to the matter in issue.

Supreme Court of Tennessee.

RIGGS' USE, vs. SHIRLEY.—COVENANT.

SEPTEMBER, 1849.

The defendant in this cause cravedoyer of the covenant sued on, and demurred to the declaration. The court sustained the demurrer, and the plaintiff appealed.

The writing sued on is a bond for \$250, with the condition, that if Shirley should pay all costs and damages, and keep Riggs harmless in a suit which Riggs had in court, then the obligation was to be void; otherwise to remain in full force and virtue.

GREEN, J., delivering the opinion, held, that the contract is not necessarily an unlawful one. It may possibly have been the interest and duty of Shirley to save Riggs harmless in the suit then pending, and pay all costs and damages. The liability of Riggs may have arisen in consequence of a suretyship for Shirley, in which case he was bound in duty to save him harmless. Or they may have stood in such relation to each other, as that by law, they might assist one another in the defence of suits. If the defence relied on exists in *fact*, it must be made by plea.

Judgment reversed and cause remanded.

Medical Jurisprudence.

The American Journal of Medical Science, for October, 1849, contains a case of successful extirpation of a fibrous tumor of the right ovary, by the large peritoneal section. The operation was performed by Professor W. L. ATLEE, of Philadelphia. Professor Atlee possesses the rare combination of the most enlarged medical science and the highest surgical skill. His eminence, and his great abilities, render his views and practical demonstrations of the advantages of anæsthetic agents particularly interesting. We, therefore, make the following extracts from his account of the operation, as contained in pp. 339, 341, 343, 346, 347 of the Medical Journal of Sciences.

[ED. AM. LAW JOUR.]

"At 10 o'clock A. M., January 15, 1849, all the arrangements for the operation being ready, I stated to the medical gentlemen present what I had before stated to my patient. Dr. Grant, as my principal assistant, and Drs. E. A. Atlee, Darrach, Meckley, McIntyre, Kaeki, Hunter, and Gobrecht, and Messrs. Murray and White, medical students, with several female friends, were present. After the patient was placed upon the table in the proper position, thirty or forty drops of a mixture of one part chloroform and two parts of ether were poured into a handkerchief, folded like a funnel, which was placed loosely over the mouth and nose, so as not to exclude atmospheric air, in which way she inhaled it until she lost sensibility, requiring, for this purpose, not over one minute. I permitted her to become perfectly unconscious for the first incision, as it necessarily would be a very extensive one, and through the most sensitive tissue. Immediately upon the full action of the chloroform being established, I made an incision, extending from the symphysis pubis, across the tumor, below the sulcus, to the middle of the crest of the ileum on the right side. This incision was curvilinear, its convexity presenting downwards, its greatest distance from the sulcus about three inches, while its two extremities approached the sulcus, so that the incision represented the arc of a circle, while the sulcus represented its chord; or, in other

words, the former was the bent bow, and the latter its string. The incision was sixteen or seventeen inches long, and was at once boldly carried down to the surface of the tumor through all the intervening tissues."

"The omentum, which was largely about the wound, was now spread evenly over the intestines, and the wound was brought together, and secured by eight needles with twisted sutures, between which were placed numerous strips of adhesive plaster—the two ligatures being brought out at the nearest points. Over these was laid a thick napkin soaked with lake-warm water, and over all was applied a figure of eight bandage, including the right thigh. The patient had her clothing changed, and afterwards carried to bed. The uterus was replaced in the pelvis. A few teaspoonfuls of brandy and water were given to her, although there was no evidence of great prostration, her pulse having remained good to the last."

"The patient, although under the influence of anæsthesia, sufficiently to destroy all sensation of pain, retained a certain amount of consciousness, as she conversed with me most of the time during the operation in reference to its various stages; and when the tumor was removed, she asked if it was out, and requested to see it. It was immediately lifted up and shown to her."

"The intestines remained perfectly quiet. The stomach and diaphragm were equally undisturbed. There was no action of the abdominal muscles. Everything about the abdomen seemed almost as passive as in the subject on the dissecting table during the whole operation, which lasted thirty-seven minutes. The temperature of the room was kept at about 80 deg. Fahrenheit."

"The tumor weighed eight pounds, measuring round its greatest circumference two feet three inches, and round its least, twenty-three inches. It is fibrous, or fibro-cartilaginous, and, in most of its characteristics, resembles the tumor I removed from Miss L. P. in 1834."—[See *Am. Med. Jour.*, April, 1845, p. 320.]

"With regard to the use of chloroform in gastrotomy, I would remark that it is likely to strip this operation of some of its dangers. Such perfect quietude of the diaphragm, of the abdominal muscles, and of the viscera, is maintained, that the operation is greatly simplified and facilitated. It does away with the necessity of constantly handling the ejected bowels to keep them out of the road of the surgeon's knife, a circumstance, in itself, calculated to induce inflammation of the peritoneum, in consequence of the greater or less contusion, by this means, of the coats of the intestines. These tender viscera, also, in not being expelled from the

cavity of the abdomen, are not exposed so much to the irritating effects of atmospheric air and diminished temperature, other causes for inflammation. Besides, the operation is not accompanied with, or followed by that shock to the system which almost invariably is connected with it under other circumstances, and which is succeeded by a corresponding reaction tending to inflammation. And it also enables the operator to do without an opiate to quiet the peristaltic action of the bowels at the time of the operation. These effects were fully illustrated by the above case, and also by two other more recent cases, which I expect to report in the next number of the Journal. The use of anæsthesia, therefore, is calculated to render gastrotony a much less dangerous operation.

"In consequence of the muscular excitement occasionally induced by the inhalation of ether, I have never been reconciled to its use; and have therefore, always preferred the employment of chloroform. The latter I have used very frequently without producing any alarming symptoms. In two cases, however, in which I administered it, soon after its introduction in surgery, it was followed by unpleasant results. Both patients were ladies. One of the operations was a subcutaneous section of a ganglion on the wrist joint, the other the extirpation of an encysted tumor on the arm. In both, after the effects of the chloroform went off, syncope immediately supervened, which was followed by vomiting undigested food, and subsequent speedy recovery. In both cases, the chloroform had been inhaled soon after taking a meal, and had the effect of arresting digestion. Since then, I have never given it on a full stomach, and no such effects have followed.

"Although I have said that no alarming symptoms have ever happened in my hands from the use of chloroform, I have, notwithstanding, ceased giving it by itself, in consequence of several cases of death from it having been reported. I now substitute a mixture of one part chloroform with two parts of ether, liquid measure, which has a most delightful effect upon the patient. The too great sedative action of the chloroform is counteracted by the stimulating effects of the ether, and, *vice versa*, the too stimulating action of the ether is counteracted by the sedative effects of the chloroform. From half a drachm to two drachms will accomplish the object in from one to two minutes. So soon as sensation is destroyed, I withdraw entirely the agent, allowing only the respiration of pure atmospheric air. I consider a linen handkerchief or napkin, ironed smoothly, and folded in the form of a funnel, so as to enclose the nose and mouth loosely, infinitely superior to all other contrivances for its administration, and also safer. It never completely excludes atmospheric air, and consequently prevents the asphyxia likely to be induced by the undiluted anæsthetic vapour.

"I observe that Dr. Warren, of Boston, uses two parts of the purest alcohol with one part of chloroform. My colleague, Professor Gilbert, who first employed these agents mixed, uses one part of chloroform with seven parts of ether. I think they, and others, upon trial, will much prefer the mixture which I am in the habit of employing."

American Decisions in England.

The August number of the London Law Magazine, in noticing Mr. Angel's Law of Carriers, makes the following remarks respecting the value of American decisions. We have had occasion, more than once, to notice the enlarged views which exist among the LEGAL profession in England. The mists of prejudice, which prevail so generally in that country, against everything American, appear to be dispersed before the "gladsome light of jurisprudence." [ED. AM. LAW JOUR.]

"We consider it a great recommendation of this work that it contains a body of decisions by the different courts of America, on the several subjects of which it treats. They are added to the decisions of our English courts on this subject, and they will not suffer by comparison. The greater part of the judgments delivered by the judges in America exhibit vigorous, acute, and sound reasoning, and an intimate familiarity with all the cases, both in England and in America, which have decided, or can assist in deciding, the question before them.

We are persuaded an English advocate will find in these judgments much to assist him in discussing before an English tribunal the subjects involved in those judgments. We know they cannot be quoted in an English court as authorities, but the day is past when a judge would interrupt a counsel who was citing a foreign writer as affording an illustration of the principle for which he contended. We can recollect the noble and learned lord, who presided on the trial of Col. D'Espard, interrupting Mr. Sergeant Best, who in his defence cited a powerful passage from the writings of Montesquieu. We have too high an opinion of the

enlarged and enlightened minds which are to be found on the benches of our superior courts, to doubt their readiness to receive assistance from cultivated and enlightened judges, in whatever part of the world they administered justice. It may be added, that the very frequent intercourse by water between different parts of the extensive territories of the United States, in addition to the great intercourse between the United States and distant foreign states, has perhaps furnished a greater variety of questions and more numerous decisions on the duties and liabilities of carriers by water, and the rights and remedies of passengers, than have arisen in England: hence from those decisions much valuable assistance may be derived."

Rev. Dr. Boardman's Sermon

TO THE LEGAL PROFESSION.

We have received from a professional friend, and have perused with much pleasure, this able and valuable production. The tribute to the memory of the late CHARLES CHAUNCEY, Esq. is well deserved. The great abilities and the many virtues of the deceased were beautifully portrayed by WM. H. DILLINGHAM, Esq. in an able address, delivered before the Alumni of a New England College, in 1835, at a time when Mr. Chauncey stood forth as one of the honored fathers of the Philadelphia Bar. His death will long be lamented by his fellow citizens.

In the Sermon of the Rev. Dr. Boardman, we were pained to perceive that the learned Divine had become acquainted with some phases of professional character, which we supposed did not exist to so great an extent as to call for such severe, public, but just animadversion as is to be found in his address. It seems, from the address, that "no inconsiderable number of those who write themselves "Attorney at Law," greatly misconceive the nature and objects of the legal profession," pursuing the law "not as a science, but a trade—not a trade even, but a system of trickery—coming to the bar as a gambler to his club, to be honest where it is politic, and to practice fraud and chicanery where chicanery and fraud promise larger gains." In the course of thirty years close and intimate connexion with the legal profession we have met with but **VERY FEW** who

answer the description thus given. Such unprincipled pettifoggers are, we believe, but rarely to be found. There is something ennobling in the science of the law—and something wholesome in its practical teachings, which are not without the most salutary influence upon its ministers.

In defining the moral duties of the lawyer, the learned Doctor speaks, in the main, like a Christian, and his sermon will doubtless do much good. We regret, however, that he has not been more guarded in his language, while discussing a subject so delicate and important. We are told by Dr. Boardman that the lawyer "may seize upon *technical informalities* in the proceedings of the other side—may avail himself of *all the advantages which the law will allow him* for vindicating his client and **BAFFLING** his opponent!"

No pious lawyer—no one of reputation for integrity will avail himself of any of the "*advantages*" and "*technical informalities*" referred to, for the purpose of "*baffling*" his opponent, *unless, in his conscience, he is satisfied that the high purposes of justice can only be sustained by such a course, in the particular case in which it is adopted.* A man, when sued upon a bond, has a legal right to compel the plaintiff to produce the subscribing witness to prove the execution. He is *morally* justifiable in taking this advantage, *if he did not sign the bond, or if the subscribing witness is cognizant of any fact connected with the execution of the instrument which is material to the justice of the case.* But if the attorney knows that his client signed the bond, and that the presence of the witness is not necessary to any purpose of justice, it would not be sanctioned by professional *ethics*, to take any such legal advantage of his opponent. That a lawyer has a legal right to take *all legal advantages* to *baffle* his opponent is not denied. But we are now in the higher forum of *Piety and Morality*. And no member of the bar can indulge habitually in a practice which would seem to be sanctioned by the Rev. Dr. Boardman, without degrading himself among Christians, and entirely losing caste with his professional brethren. It is presumed that the author of the sermon intended to qualify his remarks, by limiting such practices to cases in which truth and justice could not otherwise be maintained.

With these remarks, we insert the following paragraph from the Sermon.

"Should you take up the cause, whether on your own conviction or from our solicitation, it is no less due to us and to society, that you should conduct it throughout in a fair and honorable manner. It is not meant by this that a lawyer is to assume the functions of a judge, and take both parties under his protection. He stands before the court as the representative of one of the parties, and he is bound to omit no legitimate means which may promise to benefit his client. He may suggest arguments which are not conclusive to his own mind: the court will allow

them their due weight. He may seize upon technical informalities in the proceedings of the other side. He may avail himself of all the advantages which the law will allow him for vindicating his client and baffling his opponent. But he may not bring into the conduct of his cause a malicious or vindictive spirit. He may not needlessly blacken the character of the opposing party. He must not impugn the veracity of witnesses, whose only fault has been their modesty or their timidity. He must not seek to carry his cause by misrepresenting the facts, or by poisoning the minds of the court and jury against the antagonist client on personal or party grounds aside from the merits of the issue on trial. These, and all similar expedients, are incompatible with that integrity which is at once the ornament of the Bar and the safeguard of our rights. And they will disappear just in proportion as our courts become transfused with the purity and benignity which accompany a cordial reception of the gospel."

BARR'S REPORTS.

By the act of 11th April, 1845, the reporter of the decisions of the Supreme Court is required to publish the same with type, and on paper as good as those decisions of the said court, last heretofore published (Watts & Sergeant,) and to furnish the same to the public, well bound in law calf binding, each volume to contain not less than 550 pages, at four dollars per volume. Many suppose they receive the same amount of printed matter in a volume of Barr for \$4, for which \$5 was charged by the publishers of Watts & Sergeant; but it is not so. The pages of the latter work were printed with solid type, each page containing 48 lines;—the pages of Barr are leaded, thereby reducing the number of lines to 42, thus making an actual difference in favor of Watts & Sergeant of 78 pages of printed matter in a volume of 550 pages. This can hardly be considered a compliance with the spirit of the act of Assembly, and is certainly no gain to the purchasers of the Reports. It is hoped the above may be remedied in the next volume.

A MEMBER OF THE BAR.

THE
AMERICAN LAW JOURNAL.

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FEBRUARY, 1850.  
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District Court of the United States.

NORTHERN DISTRICT OF NEW YORK.

[Reported for the New York Commercial Advertiser.]

Buffalo, November 16, 1849.

PHILANDER HODGE, DEFENDANT *vs.* ELIJAH ST. JOHN BEMIS AND
ASAPH S. BEMIS, LIBELLANTS.

The libellants in an admiralty suit *in personam*, are entitled, under the Rules prescribed by the Supreme Court of the United States regulating the practice in causes of admiralty and maritime jurisdiction, to process of arrest against the person of the defendant, notwithstanding imprisonment for debt has been abolished by law in the State where the suit is brought.

The facts and circumstances of the case appear from the opinion of the Court.

CONKLIN, J. The defendant having been arrested on mesne process, issued at the suit of the libellants, a motion is now made, in his behalf, to discharge him from arrest.
VOL. IX.—No. 18.

rest, on the ground that the process was not warranted by law.

In January, 1845, in pursuance of the act of Congress of August 23d, 1842, ch. 188, the Supreme Court of the United States prescribed a code of rules to regulate the practice of the Courts of the United States, in cases of admiralty and maritime jurisdiction. Among these rules are the following :

“ In suits in personam the mesne process may be by a simple warrant of arrest of the person of the defendant, in the nature of a *capias*, or by a warrant of arrest of the person of the defendant, with a clause therein that if he cannot be found, to attach his goods and chattels to the amount sued for, or, if such property cannot be found, to attach his credits and effects to the amount sued for, in the hands of the garnishees named therein ; or by a simple monition, in the nature of a summons to appear and answer to the suit, as the libellant shall, in his libel or information, pray for or elect.”

“ In all cases when the decree is for the payment of money, the libellant may, at his election, have an attachment to compel the defendant to perform the decree, or a writ of execution in the nature of a *capias*, and of a *fieri facias*, commanding the marshal, or his deputy, to levy the amount thereof of the goods and chattels of the defendant ; and for want thereof, to arrest his body to answer the exigency of the execution. In all other cases, the decree may be enforced by an attachment to compel the defendant to perform the decree ; and upon such attachment the defendant may be arrested and committed to prison until he performs the decree, or is otherwise discharged by law, or by the order of the Court.”

At the date of these rules, process of arrest, both mesne and final, had, at all times, been in familiar use in Courts of Admiralty of this country as well as of other

countries. In thus openly sanctioning this form of process the two rules above recited were but simply declaratory of the antecedent general law. But imprisonment for debt had been previously abolished in the State of New York, and in several other States; and by the act of Congress of February 28, 1839, ch. 35, and the supplemental act of January 14th, 1841, these state laws, and any others for the like purpose which might by any of the States be subsequently enacted, were expressly adopted and declared obligatory upon the Courts of the United States, sitting in the States where they should exist. The language of these rules, purporting to have been framed under a power conferred by a subsequent act of Congress, is nevertheless explicit and unlimited. On what ground then can the Courts for whose guidance they were prescribed, lawfully refuse to carry them into effect?

It has been suggested that the above cited acts of Congress, adopting the State laws, may have been inadvertently overlooked by the Supreme Court. But until the inferior courts shall have been informed by that court, it would be neither decorous nor proper for them to act upon this assumption; and besides, even conceding it to be well founded, the rules would still be valid and obligatory, if the Supreme Court had power to prescribe them.

It has been intimated, also, that Congress had no authority to delegate to the Supreme Court a power so important as that of restoring the right to imprisonment for debt, after it had been abolished by law. But there are not wanting many instances of the delegation, by Congress, of powers in their nature legislative, and which have nevertheless been adjudged to be valid, or been acquiesced in as such. Thus, for example, authority has been given by law to the Secretary of War to prescribe regulations relative to the granting of pensions, in pursuance of which he has directed certain oaths to be taken,

and has designated certain officers by whom they are to be administered ; and it has been judicially held that false swearing, under these regulations, constitutes the crime of perjury.

It has, moreover, been argued that the rules in question were not warranted by the language of the act, in pursuance of which they were framed. It is readily conceded that to justify the engrafting of even so limited an exception, upon a statute designed to secure the personal liberty of the citizen, the authority ought to be clear. On referring to the act of 1842, it will, however, be seen that it does, in terms, invest the Supreme Court with plenary power and authority to regulate the forms of process and the whole practice of the Courts of the United States. But, even admitting the power to be doubtful, it cannot reasonably be expected of this court, that it should assume to sit in judgment upon the acts of the Supreme Court, on a charge of usurpation.

In regard to all these objections, it is to be farther observed, that they severally assume as unquestionable that the above cited acts of 1839 and 1841 were intended by Congress, to embrace suits in admiralty, as well as those at common law. But the Supreme Court may have thought otherwise. The acts of Congress abolish imprisonment for debt on process issuing from a Court of the United States, where it is forbidden by the State law. But there are no State Courts of Admiralty, and no admiralty process, therefore, to which the State laws, *proprio vigore*, apply.

Perhaps, however, the most probable supposition is, that the Supreme Court, whatever it might suppose to be the true construction of the acts of 1839 and 1841, believing itself fully warranted by the subsequent act of 1842, even to restore to suitors in the admiralty, if in truth it had been abrogated, the right to all the customary and

long-established forms of process, was of opinion that the abolition of the process of arrest, and along with it, of those securities exacted and enforced by means of it, so conducive to the effectual and speedy enforcement of justice, would be unwise and inadmissible.

But whatever views of the subject may have governed the Supreme Court, in the adoption and promulgation of the rules in question, I consider it to be my duty to give effect to them, until I shall be otherwise instructed by that court. The motion for the discharge of the defendant is, therefore, denied.

Auburn, November 27, 1849.

JACOB T. MERRITT AND OTHERS, LIBELLANTS, vs. EDWARD SACKETT AND GEORGE SACKETT, DEFENDANTS.

The jurisdiction of the Court of an action *in personam* in favor of material men doubted, and its exercise declined.

The facts and circumstances of the case are stated in the opinion of the Court.

CONKLIN, J. This is an action *in personam*, on the admiralty side of the Court, instituted under the act of Congress of February 26, 1845, conferring a quasi-admiralty jurisdiction upon the District Courts of the United States, of certain cases arising out of the commerce and navigation of the lakes. The suit is for the value of certain articles of ship-chandlery sold by the libellants, who are dealers in such articles, having their place of business in the city of New York, to the defendants resident at Sacketts Harbor, in this district, alleged to have been designed for use, by the defendants, in the completion and fitting out of the schooners *Arkansas* and *Alabama*, at the latter place.

A warrant of arrest having been issued and returned

executed, it is now, on the return day of the process, objected, in behalf of the defendant, that the Court has no jurisdiction of the case, and that the defendant ought therefore to be discharged from arrest, and the libel dismissed. The objection is founded on the domestic character of the vessel, and I am the more anxious explicitly to state the grounds of the conclusion at which I have arrived, because it is at variance with what was said by me some months ago, when called on to decide upon the admission of a libel of the like nature with this. My answer in that case to the application of the proctor for an order directing process to issue, was as follows :

“ Whether this suit is maintainable is a question which has not yet been directly decided by the Supreme Court. The admiralty jurisdiction of the American Courts of suits *in personam*, by material men for labor, materials, and supplies, in a home port, was however distinctly asserted by Mr. Justice Story in delivering the opinion of the Court in the early case of the *General Smith*, and follows as a necessary consequence of the doctrines constantly asserted and acted upon by him in his circuit. The principle upon which he is well known to have uniformly insisted, is, that the admiralty jurisdiction *in personam* extends to all maritime contracts ; and the contract in question is clearly of that character—whether in the case of a domestic or of a foreign vessel. It is upon this ground alone that the admiralty takes cognizance of liens in favor of material men, given by state laws, for repairs and supplies furnished in a home port. Several of the Judges of the Supreme Court, in dissenting opinions, and at the circuit, have controverted this general principle ; but it has been uniformly acquiesced in and repeatedly applied by the majority of the Court, as it has also been by several of the District Courts.

Under these circumstances, I do not feel at liberty to

decline to take cognizance of suits *in personam*, in favor of material men in the cases of vessels embraced by the act of Congress, although the services may have been rendered, or the materials or supplies furnished, at the place of the owner's residence.

In the foregoing review of the question, it will be seen, no reference is made to rule 12th, of the rules prescribed by the Supreme Court of the United States 1845, to regulate the practice of the Courts of the United States, in cases of admiralty and maritime jurisdiction. In fact the rule was then altogether overlooked. It is as follows :

“ In all suits by material men, for supplies, or repairs, or other necessities for a foreign ship, or for a ship in a foreign port, the libellant may proceed against the ship and freight *in rem*, or against the master or owner alone *in personam* ; and the like proceedings *in rem* shall apply to cases of domestic ships, where, by the local law, a lien is given to material men for supplies, repairs, or other necessities.”

The direct object of this rule was to prescribe, or declare, the various forms of remedy, to which those known in admiralty jurisprudence as material men, shall have a right to resort for the enforcement of their claims. It is one of a series of rules, by the others of which it is immediately followed, having the like object in relation to other subjects of admiralty jurisdiction. The latter branch of the rule, authorizing a suit *in rem*, for supplies furnished to a domestic vessel, where by the local law a lien is given, may not necessarily require a construction which would exclude a farther remedy *in personam*—though there is strong color for such an interpretation, according to the legal maxim, *expressio unis exclusio est alterius*.

But these rules imply a consciousness, on the part of the Judges of the Supreme Court, of the right, and, indeed, of the necessity, of exercising to some extent, what

savors strongly of discretionary authority, in determining the limits and conditions of this branch of the jurisdiction of the American Courts : and no one who is familiar with the uncertainty and difficulty by which the subject, as left by the Constitution and the Judicial Act of 1789, was environed, and the discussions to which it has given rise, can fail to perceive the impossibility of excluding considerations of expediency altogether from the inquiry. This is a point of some importance in the present case, because, although the general principle has been incidentally asserted on several occasions by the Supreme Court, that all maritime contracts fall within the scope of the admiralty jurisdiction, (and the contracts of material men are reputed to be of this description,) yet what was said in the case of the *General Smith*, 4 Wheat. R. 438, as to the right of the material man to sue *in personam* in the admiralty, was but an *obiter dictum*, and in the subsequent case of *Ramsey vs. Allegre*, 12 Wheat. R. 611, the Court expressly waived any decision upon the question of this right, and one of the Judges, in a very elaborate opinion, unequivocally denied its existence.

Under these circumstances it seems not unreasonable to suppose that the Supreme Court thought proper, if not absolutely (by implication) to repudiate the remedy *in personam* in the case of domestic vessels, at least to reserve the question for future consideration. The contract of marine insurance is also, so far as I can discern, undeniably a maritime contract, and as such, was very naturally held by the late Mr. Justice Story to be comprised within the admiralty jurisdiction of the Courts of the United States. Still, in no instance is it believed, out of the First Circuit, has a suit in the admiralty been maintained or instituted on this species of contract ; and in the case of the *New Jersey Steam Navigation Company vs. The Merchants' Bank of Boston*, 6 Howard's R. 344, the dis-

tinguished counsel for the libellant, though arguing in favor of a comprehensive admiralty jurisdiction, expressly disclaimed its existence in the case of marine insurance. In order, however, to justify this disclaimer, it became necessary for him to qualify the general principle above mentioned, affirming the admiralty jurisdiction over all contracts in their nature maritime, and virtually to limit it to these for the *performance of maritime services*.

But the principle thus restricted, would exclude material men, as well in the case of foreign as of domestic vessels, and also bottomry bonds, which have at all times been admitted to be within the admiralty jurisdiction, even in England. If, therefore policies of insurance are to be excluded from the admiralty jurisdiction, the exception, so far as I am able to discern, will be purely arbitrary: and yet the impression seems to be generally entertained, that the Supreme Court is not likely, if the question should ever be brought before it for decision, to uphold the admiralty jurisdiction over this species of contract.

With respect to the remedies for materials or supplies furnished for a vessel in her home port, it is also to be observed, that it is only in virtue of the lien given by a State law that the admiralty jurisdiction is held to attach at all; and if the question had not already been determined, it might be worth while to consider, whether it would not be better to leave such liens to be enforced in the State tribunals alone. But the ground on which the established doctrine rests, is, that while the lien given by the local law is to be regarded as in its nature maritime, and therefore fit to be enforced by admiralty process, yet that no lien is given by the general maritime law—the contract being but an ordinary personal transaction between the parties residing in the same place, and the exigencies of commerce not requiring that any lien should be implied. Would it be absurd, then, to hold the contract to be one with which the maritime law has no especial concern, and

which therefore confers no right to resort to a maritime court for its enforcement?

Without pursuing the enquiry further, my conclusion is, that the omission in the Rule above cited, of any mention of a remedy *in personam* in favor of material men in a home port, was made *ex industria*, and was designed to be significant. For this reason alone, therefore, I deem it more safe and discreet, for the present at least, to abstain from the exercise of this jurisdiction. There is another consideration also connected with the subject, which, under existing circumstances, is fitted to awaken additional caution in dealing with this question, and which might, perhaps not improperly, in some degree influence a decision upon the propriety of assuming a doubtful authority. To render the remedy in question more effective than a suit at common law in a State Court, resort must be had to the process of arrest against the person of the defendant; and it was doubtless in the hope of deriving superior advantage from the employment of this form of process, that the libellants have seen fit to come into this court at all. But imprisonment for debt by means of process issued from the State Courts, having in this State been abolished by law, its continuance, through the process of the national courts, in cases of admiralty jurisdiction, is regarded with jealousy and distrust. In a recent case, the legality of such process from this court was denied, but was upheld by the court. And in the present case, as I am informed, a writ of *Habeas Corpus* has been sued out by the defendant, before one of the State judges, on the ground that the process of arrest was not warranted by law. Collision between the state and national authorities is always to be deeply regretted, and no enlightened and patriotic functionary can be insensible to the duty of carefully abstaining, as far as he can consistently with paramount obligations, from all acts likely to lead to so deplorable a result.

District Court of the United States.**EASTERN DISTRICT OF PENNSYLVANIA.****VANDERSLICE vs. THE STEAM TOW-BOAT SUPERIOR—IN ADMIRALTY.**

1. Considerations stated by Kane, J., for holding a steam tug to the rigid accountability of a common carrier, in opposition to the case in 3 Hill N. Y. R. 9.

2. The Captain of a steam tug is the pilot of the voyage, and is the best judge of the sufficiency of the canal boat taken in tow to resist the weather, and of the adequacy of her crew to do what may be required for her protection, and cannot limit his responsibility by a notice given at the time of commencing the voyage, that it must be at the risk of the canal boat.

3. The steam tug, notwithstanding such notice, is bound for the exercise of all that skill and care which the circumstances of the case demand.

Opinion per KANE, J.

The steamer Superior was customarily employed by the Philadelphia and Havre de Grace Steam Towboat Company in towing vessels for hire between Philadelphia and the Delaware outlet of the Chesapeake and Delaware Canal.

On the 15th of March, 1846, Captain Metz, her commander, was applied to by the libellant, to tow his canal boat, the Judge Roger, then laden with a valuable cargo, down the river.

Captain Metz objected, alleging that the state of the weather was such as to make the trip a hazardous one; but being pressed by the libellant and several other masters of canal boats which were in waiting, he finally consented to take them, saying at the same time that "the weather was unfit to go down the river that day, and that if they must and would go down, they must do so on their own responsibility," or "at their own risk."

Three of the canal boats were thereupon attached to

the sides of the steamer; but one of them meeting with an accident immediately after, two only proceeded. Of these, one was very soon cast off at the request of her captain; thus leaving only the boat of the libellant, who persisted in his purpose to go on.

They had not however made much progress before it was deemed prudent to detach the Judge Roger from the side of the steamer, and to tow her astern. In doing so, the canal boat got into the trough of the sea, and rolled so heavily as to lose some casks of merchandize, that made part of her deck load; and it was then agreed that she should be run in upon the mud flats on the Pennsylvania side above the Pier at the Greenwich Point house, where it was thought she might take the shore safely.

It was ebb-tide, and the wind was blowing hard from the Jersey shore. The manœuvre of casting off the canal boat was executed badly on one side or the other, and she struck against the pier with so much violence as to damage her greatly. She succeeded, however, in anchoring a short distance below; when the steamer, returning either for the purpose of rendering assistance, or of receiving the towline which had been left fast to the canal boat, came into collision with her so forcibly as to break several of her own paddle wheels, and further to injure the canal boat in a greater or less degree.

After this the steamer again took her tow conducting her in a nearly sinking state towards the Jersey shore; and having almost reached it, she again cast her off, and directed her course for Philadelphia. But the depth of the water and the adverse wind and probably also the condition of the canal boat prevented the libellant from beeching his boat by means of poles, and she in consequence drifted out into the stream. The steamer returned upon observing this; but again coming into collision with her broke into her stern and completed her wreck.

The boat sank, her hatches came off, part of her cargo drifted out, and nearly if not quite all of the remainder was damaged.

I believe that there is no dispute upon the facts which I have recapitulated. The discrepancies in the testimony relate to the sea-worthiness of the canal boat at the time of leaving Philadelphia, and the degree of skill and care displayed by the steamer in the subsequent incidents.

The libellant claims indemnity for the damage done to his boat and her cargo by these repeated collisions. He considers the steamer as in the occupation of a common carrier, and liable for all losses which have not been occasioned by the act of God, or of public enemies; and he denies that the limitation by the captain of his responsibility, by the notice to the libellant, if admissible at all, can be so extended as to exempt him from liability under the circumstances presented by the evidence. For he says in the second place, that the loss was directly occasioned by a want of that ordinary skill and care on the part of the steamer which are engaged by every carrier of goods for hire.

The claimants, the Tow Boat Company, deny that they are common carriers; and assert that being ordinary bailees, bound as such by force of the ordinary contract only to the exercise of ordinary care and skill, their special disclaimer of responsibility, impliedly acceded to by the libellant at the time of contract, must be construed as exempting them from liability for everything except just that measure of skill and care which would be exacted by the circumstances of a voyage which involved no special or extraordinary hazards. They affirm that they did exercise this measure of skill and care; that the collision of the canal boat against the pier was occasioned by her being insufficiently manned; and that, as to the two subs-

quent collisions, they must be referred to the state of the weather, and were, moreover, in their consequences of no importance, since the first collision had reduced the canal boat to a state of wreck.

The first question thus presented is: Whether steam tugs, whose regular and constant business it is to tow boats for hire, are to be regarded as common carriers, when the owner or master of the boat towed remains on board of it. Chancellor Kent, in his Commentaries, Vol. 2, 599, includes them in this class of bailees, but cites no authority for the position. On the other hand, Judge Story excludes them from it, Bailments §496, referring in the margin to the case of *Alexander v. Greene*, 3 Hill, 9.

I confess that, after reading that case over carefully, the reasoning of the court does not appear to me conclusive, and that I am much more impressed by the argument of the counsel for the unsuccessful party. It has been suggested, that such steam tugs should perhaps hold a place between common carriers and ordinary bailees for the carriage of goods; not liable in general for loss by fire or robbery, since the owner or his immediate agent has to a certain extent the continued supervision of his property, but to be otherwise held to the highest degree of accountability, since the vessel towed is for the time under their control—quite as much so as the baggage of a passenger in a stage coach.

But, if they are not to form a distinct new category, I should be strongly inclined to the opinion that they must be treated as common carriers.

Their occupation is essentially a public one—they hold themselves out to the world as ready to serve all who will employ them, and they have whatever of advantage any common carrier can derive from such a public announcement.

They have the custody and direction of the vessel to be

transported: it is generally fastened to the steamer in such a manner as not to be safely detached while the two are in motion, unless by the act of those on board the steamer; and if detached while on the way, the boat is without any power of providing for her safety. The hands on board the boat, moreover, receive their orders from the steamer's captain—and in fact the two move on together under the sole impulse and guidance of the steamer.

The vast interests, which are daily confided to such steam tugs, the hazards to which our internal commerce may be subjected by a want of the highest degree of skill and care on the part of those who command them, and the difficulty of drawing the line in a court of justice between the consequences of mismanagement and those of mere stress of weather, or, where these come together, as they often do, of assigning to each its appropriate share of influence;—these considerations urge us very strongly to hold the steam tug to the rigid accountability of a common carrier.

But I do not think it necessary to decide the question. Though the law of Pennsylvania under which this contract was made, seems to be settled by the Supreme Court of the State, however reluctantly, that a common carrier may restrict his common law liability by special contract; yet the extent to which such a limitation may go is itself limited very strictly. It has never been contended, that the limitations can be so enlarged as to relieve him from the exercise of all ordinary skill, diligence and care. The utmost, for which he has ever been allowed to stipulate, is that his liability should be subject to the same rules as that of an ordinary bailee for hire.

What then was the liability of the steamer, considered as an ordinary bailee, who, at the time of contracting, had given to the master of the canal boat the special notice

which is in proof? Independent of that notice the engagement was for the exercise of adequate skill, and of reasonable care and prudence in towing the boat to her destination,—skill and prudence, both adapted to the circumstances, hazardous or otherwise. Did the notice vary this engagement?

In the case of *Alexander vs. Greene*, already referred to, it was decided that an engagement to tow a boat “at the risk of the master and owners thereof” relieved the steam tug from all liabilities arising from a want of ordinary care and skill; and it has been contended here with great force, that the notice by Captain Metz that if the canal boat determined to go, it must be on her own responsibility or at her own risk, should have an equally broad effect.

I acknowledge that I cannot distinguish the two forms of expression, so as to give them a difference of import. But I have not been able to satisfy myself, that the notice in either case should have the effect contended for.

I cannot conceive of a contract for transportation, which shall be so limited, as to exonerate the carrier, when the property entrusted to him is destroyed by his negligence or want of skill. Such a contract would have no meritorious consideration: its terms involve no engagement at all: it means nothing, but that the carrier will not fraudulently or wilfully destroy the property; and to this every man, whether carrier or not, is bound by the law of the land, in reference to the property of every other man, without any contract whatever.

In my judgment a saving of this sort would be repugnant to the spirit and purpose, as well as the body of the contract; and, were such an interpretation claimed for the notice in this case, I could not regard it otherwise than as void. Such I may remark, seems to be the opinion

also of the accomplished editor of the *American Leading Cases*, in his comments on this decision.

But the claimants here do not assert this doctrine without qualification. They admit themselves bound for the reasonable skill and diligence which would be adequate to an ordinary risk; and only ask exemption from employing that higher skill and diligence which the particular emergency in this case called for.

Still I cannot accede to the legal policy which would sustain even such a limitation. It could never have a practical interpretation.

What is its import? Does it mean that if in consequence of the storm the captain of the steamer shall become too much absorbed in anxiety for his own safety to think of any thing else, this shall be enough to discharge him and his steamer from liability? Does it mean that he may cast off his tow to the mercy of the elements, so soon as he becomes sensible that his own risk is increased by keeping it attached? His own safety, and the safety of his tow would no doubt have been more complete, if neither had left the wharf at Philadelphia; now, what increase of peril, beyond that of encountering the elements at all, shall be deemed the *casus faderis*, which is to excuse his negligence or want of skill in meeting it! And how are we to subdivide and distribute the *indicia* of nautical skill and prudence, so as to mete out to the vessel under tow its just portion of them in the varying contingencies of such a voyage!—asserting for it all that would be needed in favorable weather, but denying its right to any more?—distinguishing circumstances into ordinary and peculiar, that differ only by inappreciable degrees, as the height of a wave, or the force with which the wind blows, and referring the injury which is complained of to one or the other class of causes; thus ascertaining whether the peril was within the contract or its limitation?

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How shall we decide in reference to a particular case of peril or difficulty, that it called for *extraordinary* energies, but that the energies that combated it were merely *ordinary* !

It involves no hardship to the master or proprietor of a steamer, whose daily occupation is the navigation of the river, to assume that he is acquainted with its hazards, and fitted to decide whether the state of the wind and tide will allow him to carry down his train of canal boats in safety. He is the pilot of the voyage: he is the best judge even of the sufficiency of the canal boat to resist the weather, and of the adequacy of her crew to do what may be required for her protection. It is in evidence that when the water is smooth, and the tow boats are attached in consequence to the steamer's guards, the hands of the tow boats have nothing to do,—that boats have occasionally been towed in safety without any person on board,—at other times, when the boat is towed astern, a man is required to steer her, and a boy or another man to give occasional assistance. Sometimes a still larger crew may be required by circumstances. Again, the form, dimensions, and lading of the tow boat have their influence. A decked boat with a light cargo is perfectly safe in weather which would swamp an open boat, heavily laden. Now, when a boat offers herself for towage, it is the proper office of the master of the steam-tug to determine upon all these points, and to refuse to take her if she is either too imperfect in her structure and arrangements, too heavily burthened, or too lightly manned to meet the apparent hazards of the particular voyage. He would have this right, whether regarded as a common carrier or as an ordinary bailee ; and I see no objection to requiring that he shall exercise it.

I am inclined, therefore, to decide that the limitation of the claimants' liability, which has been contended for, does

not exist; and that the steam-tug, notwithstanding the notice, was bound for the exercise of all that skill and care which the circumstances of the case called for.

Did Captain Metz exercise this degree of skill and care?

I have examined all the evidence in the case very fully and cautiously. There is in it just about the usual conflict of recollections that belongs to controversies of this sort. Men who are parties in a scuffle, or on board different ships that come into collision, never agree as to where the blame lies: Even lookers on very seldom unite in detailing occurrences of an exciting character. Especially is this true as to times, distances, and even as to the order in which incidents have followed each other. It is often in consequence the most puzzling duty of a Judge, to determine from the conflicting evidence of honest and intelligent witnesses, what the truth is which they all profess to detail. In such a case he is fortunate if he can get hold of some fact independent of memory—some land mark that cannot have been subjected to change. I think we have something of this sort in a part of the evidence here.

It is found in the position and course of the canal boat at the moment of striking the wharf, as determined by the part on which she received the first injury. She struck on her starboard bow: her head, therefore, was that moment inclined outwards to the river, and off from the flats. She struck, moreover, with great violence; so as not only to break in her bow, but to indent or displace the wharf-log against which she struck. I do not see how these two circumstances can be explained, unless by the supposition that at the moment of striking she was obeying a powerful impulse derived from the steamer.

Now it is agreed on all hands, that the steamer and the canal boat were on the Jersey or weather side of the river, where it was determined that the boat should be cast off;

that the steamer immediately directed her course towards the Pennsylvania shore, and reaching this side of the channel, passed immediately below the powder wharf, 562 feet above the place of the first accident, still steering towards the flats. Then inclining down stream in the cove between the powder wharf and the wharf at the Ferry, where the water was smooth, she skirted along the flats; the canal boat in the meantime steering towards the Pennsylvania shore. Arriving near the lower or Ferry wharf, the steamer again headed outwards towards the deep water; and it was about this time, or immediately after, that the canal boat struck the wharf.

So far the witnesses concur. The witnesses for the steamer say, that soon after passing the powder wharf she slackened her speed, and at last checked it altogether for the purpose of enabling the canal boat to throw off the bow-rope; and that this would have been effected if the crew of the canal boat had been effective; but that the libellant being at his helm, and no other person on board but a boy who was not strong enough to unhook the rope, the libellant left his helm to assist him, and thus occasioned the accident, though the steamer had in the meantime thrown loose her tow rope.

Now, it is plain that this of itself would not have produced the collision. Had the steamer stopped in time, and the tow-rope been fully slackened, the canal boat would not have had sufficient headway to drive her against the wharf so forcibly; and her motion directed inwards by her helmsman, and aided by the wind, would have continued towards the shore, rather than outwards against wind and steerage.

The story on the other side denies that the captain of the canal boat ever left his helm, and refers the injury to the continued speed of the steam boat, which kept the tow line *tight* until the boat was nearly in contact with

the wharf, even while the steamer was heading out herself; and thus made it impossible for the boat to obey her helm. This view of the facts, which is borne out moreover by the testimony of those who witnessed the accident from the shore, seems to me to be fully corroborated, and I have already remarked by the force and direction of the boat's impact against the wharf.

There are numerous facts disclosed in the depositions which point to the same conclusion. It is not necessary for me to refer to them in detail. I have been particularly struck by the reported difference in the bearing of the two captains:—the one excited, intimidated, losing his presence of mind, hurrying about his vessel, multiplying orders—twice bringing his steam boat into forcible collision with the sinking canal boat which he sought to rescue;—the other calm, resolute, efficient; endeavoring to secure his boat to the wharf by lines after the first accident; anchoring her when that failed; holding on to his chance of deliverance even after the steam boat had become entangled with her afterwards; refusing to quit his post when warned that she was bearing down on him the second time; and even after she had again struck him, and he was driven down in the water to his knees by the last collision, holding on to his vessel till he had made fast to her bow the line by which she was dragged ashore at last after she had sunk. In a question which involves the seamanship and prudence of these two men in the circumstances which led to the first accident, I am justified in referring to their subsequent conduct in the disasters which followed.

I am constrained to say that the captain of the steam tug appears to have failed in the performance of what I suppose to have been his duty. It was not enough that he shut off his steam when approaching the wharf; for this would only check without arresting the motion of

his vessel; he was bound, in the exercise of ordinary care, even if the weather had been calm, to see to it that the rope was adequately slackened to allow the canal boat to get ashore; and if he found that from any cause the rope was not at once detached, he was bound to wait till it could be done; or if the wind and his position made it dangerous for him so to stop on his course, he should have retained his hold of her, carrying her out with him into the channel again, and repeating his manœuvre at some lower point on the river. I fully acquit him of all wilful misconduct; but I cannot escape the conclusion, that had he been more self-possessed than he appears to have been; in a word, had he exercised the ordinary skill and prudence which his contract of bailment implied, the first accident never would have occurred.

As to the two subsequent collisions, the argument for the claimants admits that they are without legal justification or excuse.

The preliminary questions which were raised upon the pleading, do not seem to me to involve a difficulty. The bailee of goods has such a property in them as will support a suit for damage done to them; and though the party damaged by a collision cannot in any case receive a double satisfaction, I do not see any reason for refusing him permission to include in the initiation of one proceeding his claim of recourse against the ship which has injured him, and against its owners to the extent of their interest in it.

The decree will be *in rem* for the libellant for the amount of his actual loss by reason of the three collisions that have been referred to, with interest, in the nature of damages from the date of the occurrences, and with full costs: And it is referred to the Commissioner to ascertain the amount of this decree.

First Judicial District of Pennsylvania.**QUARTER SESSIONS OF PHILADELPHIA COUNTY.****COMMONWEALTH vs. WILLIAM T. JOHNSON.**

1. A person who lets his house to another knowing that the lessee intends to use the house for the purpose of keeping a bawdy house is guilty of an indictable offence.

2. Such person cannot, however, be convicted on an indictment which only charges in general terms the offence of keeping a bawdy house. The facts must be specially set forth.

The opinion of the whole Court, in Bank, was delivered by PARSONS, J.

This is an application for a new trial. The defendant was indicted for a nuisance in keeping and maintaining a house of ill fame; and is charged in the common form which generally prevails relative to indictments for this offence in Pennsylvania.

It was clearly shown on the trial that the defendant leased his house to a female of bad reputation who kept the house for prostitution, and it is conceded that there was some evidence to show that when the defendant rented the property he knew the purposes for which the lessee designed to use it. It was contended on the trial, that in as much as the Commonwealth had not averred in the bill the leasing and the *scienter* relative to the criminal design for which the property was leased, he could not be legally convicted, and the Judge who tried the cause charged the jury that it was not necessary that these facts should be averred in the bill, in order that they might pass upon the facts, and reserved the question which is now presented for the decision of the whole court, whether there ought to be a conviction on this state of facts, under this form of indictment.

The court have no doubt that if a man rents his property to a tenant knowing at the time that it is to be kept as a brothel, he is violating the law, and may be punished for maintaining and keeping a nuisance. Such an establishment is against the good morals of society, and offensive as well as injurious to the neighborhood where it is located.

But while such is the result of his acts, the question now before us is, whether he ought not to have been specially charged in the indictment according to the facts of the case, that is, that he was the owner of the house and leased it to the tenant well knowing that she designed and intended to keep it as a brothel.

There does not seem to be any English authority distinctly on this point. None was cited on the argument, and during the limited period the court have had for the examination of the subject we have discovered none.— But the question seems to have received the attention of the courts in two of our sister States, and the decisions are different. In New York, 1st Denio 129, *The People vs. Jenin*, it is ruled that an indictment like the one in the present case is good, and that it is not necessary to aver the leasing, but that simply to charge that the owner kept it, when shown that he leased it knowing that it was to be kept as a bawdy house, is sufficient. And if we adopt this decision as our guide, then the present verdict must be sustained.

But in Massachusetts, in the case of *The Commonwealth vs. Harrington*, 3 Pick. 26, it would seem to be decided that the indictment should state the leasing, and the guilty knowledge at the time. When discussing the general principle whether it was an indictable offence for a man to rent his house for such a purpose, Chief Justice Parker seems to put the case upon the ground that it was alleged in the indictment that the defendant knew

that his house would be put to an unlawful use, and that he let it for that purpose. What then shall be the rule in this county is now the question before us.

The decision in the State of New York is based upon the familiar principle of criminal law, that in misdemeanors there are no accessories, but all are principals, for he who advises, supplies the means, reaps the benefits, or causes the commission of a misdemeanor is a direct offender. Nor can this principle as a general rule be controverted.

But in its application there are also other principles of pleading which must be observed. One of which is, that to make an indictment good, the special manner of the whole fact ought to be set forth with such certainty that it may judicially appear to the court that the indictors have not gone upon insufficient premises; 2 Haw. P. C. 320. Hence it is said "that an indictment charging a man with a nuisance in respect to a fact which is lawful in itself, and only becomes unlawful from particular circumstances is insufficient, unless it set forth some circumstances which make it unlawful;" 2 Haw. 321.

Now a man has an unquestioned right to rent his house to whom he pleases, and the letting of it is in itself an innocent act; but if he let his house for the purposes of prostitution, and he knew that it was to be so used, the act then becomes criminal. The design and knowledge that it is to be used for illegal purposes constitute the offence, and make the act a misdemeanor. If so, then ought not the pleader to state the special circumstances of the whole case with certainty? Such seems to be the view taken by the court in the case of the Commonwealth vs. Harrington. The form of such an indictment, and the one sustained in that case, will be found in Wharton's Precedents of Indictments, 435.

Such a system of pleading seems best to comport with

the general rules in criminal cases, and is imposing no unnecessary labor or hardship on the pleader, for it is easy to prepare the bill to meet the facts of the case. And certainly it is but just to the defendant that he should be fully apprised of the facts which he will be called upon to meet on the trial, in order that he may properly prepare his defence. This is but simple justice, and is more in accordance with the rules which we apply in other cases. Moreover, this view of the case is in strict harmony with former decisions made by this court. It was upon this ground that we determined the case of the Commonwealth vs. Miller, at the last June Term.

Relative to the point as to the form of the indictment, we deem it most safe to follow the view taken by the Supreme Court of Massachusetts, and therefore, in our opinion, this indictment is defective in not setting forth the whole facts (to wit) that the property was leased with the knowledge that it was to be used for illegal purposes; and on that ground a new trial ought to be granted.

It is not sufficient to charge the offence in the usual common form, and then prove the leasing and guilty knowledge. These are material facts, which ought to be stated upon the record, and unless they are properly averred we do not think the conviction ought to be sustained for the reasons above stated.

Supreme Court of New York.

Rensselaer General Term. November, 1848. Before Justices Harris, Watson & Parker.

HILL vs. HILL.

[S. C. 4 BARBOUR'S SUP. COURT, REP. 419.]

1. Previous to the adoption of the revised statutes of New York, an executor-

ry devise limited upon an indefinite failure of issue was void, because it might not vest within the compass of twenty-one years and nine months after a life or lives in being.

2. When an executory devise was made dependent on the first taker's "dying without lawful issue," such words, unexplained, had a fixed legal signification, and imported an indefinite failure of issue, and not a failure of issue living at the death of the first taker.

3. A different interpretation will, however, be given to such and similar words where there are other provisions of the will showing that the testator intended a failure of issue living at the death of the first taker.

4. Where an executory devise, limited upon the first taker's *dying without lawful issue*, was made subject to the payment, by the executory devisee, of legacies to three persons then in being, when they should severally become of age, it was *held* that the testator did not contemplate an indefinite failure of issue, but that he must have intended the estate to vest on the death of the first taker.

5. An executory devise is void where it is repugnant to the absolute ownership and power of disposal given to the first taker. Otherwise when the *jus disponendi* is conditional.

6. Where the testator devised land to T., his heirs and assigns forever, provided the said T. should not sell the same within fifteen years, unless to one of his children; and in case said T. died without lawful issue, the estate to go to A., his heirs and assigns forever; it was *held* that the devise to T. was subject to two conditions; and that if he sold to one of his brothers within the fifteen years, or to any other person after that time, the grantee in either case, would take the land subject to the other contingency, viz: the death of T. without lawful issue.

7. The mere taking of a quit-claim deed does not estop the grantee from questioning the title of his grantor. The rule is otherwise, as between vendor and vendee before conveyance, and between landlord and tenant. In both these cases the possession must first be surrendered before the title can be questioned.

8. There is no estoppel except where the occupant is under an obligation, express or implied, to restore the possession at some time or in some event.

9. But where by an indenture freely executed between the parties, T. covenanted that if a certain condition was not performed within a stipulated time, A. might enter upon, and hold, and enjoy the premises, he was held to be estopped from questioning A's right.

10. And where a party is estopped by deed, all persons claiming under or through him, are equally bound by the estoppel.

This was an action of ejectment brought by Patience Hill against Whiteside Hill, to recover land lying in the county of Washington. The cause was tried before WIL-
LARD, Circuit Judge, at the Washington Circuit, in October, 1845. The following facts appeared on the trial.—

Alexander Hill died seised of the premises in question in 1809, leaving a last will and testament, which contained the following devise :

“ Item. And whereas I have heretofore by my several deeds of conveyance, given and granted to my sons, William Hill, James Hill, Peter Hill, and Whiteside Hill, such parts and proportion of my landed estate as I intend, therefore I give and devise unto my son Thomas Hill, all the residue of my real estate, and to his heirs and assigns forever. Provided always and my will is, that the said Thomas shall not sell or convey the estate hereby devised to him, within fifteen years after my decease, *unless such sale shall be made to some one of my children ; and in case my said son Thomas shall die without lawful issue*, then and in such case, the said real estate is hereby given and devised to Alexander Hill, my grandson, the son of James Hill, and to his heirs and assigns forever ; subject to the payment of one hundred dollars to Alexander Hill, the son of Peter Hill, when of age ; of one hundred dollars also to my grandson Alexander Hill the son of Whiteside Hill, when of age ; and one hundred dollars to my grandson Alexander, the son of Francis McLean, when he comes of age.”

It was admitted that the premises claimed in the declaration were included in the above devise, and were in the possession of the defendant at the time of the commencement of this suit.

Thomas Hill died in November, 1842, leaving seven children. The maiden name of the mother of said children, was Polly Pitts. She was married to said Thomas Hill, by Charles F. Ingalls, Esq., a Justice of the Peace of Washington county, in 1827. She had three children by said Thomas Hill, before said marriage, and four afterwards. The said Polly, previous to her marriage with Thomas Hill, and previous to the birth of said children,

had been legally married to one George Foree, who was still living at the time of the trial. Such marriage had never been dissolved or annulled. Thomas Hill was never married to any one except said Polly, and left no children except those born of said Polly. Alexander Hill, the grandson of the testator, and son of James Hill, named in said will, died in February, 1844, leaving no widow, but five lawful children, his heirs at law, of whom the plaintiff in this suit was one, who was over 21 years of age when this suit was brought. Both Thomas Hill, and said Alexander Hill, the son of James Hill, died before this suit was commenced. Alexander the son of Peter Hill, Alexander the son of Whiteside Hill, and Alexander the son of Francis McClean, were still living, and the youngest of them was born in 1806.

On these facts the plaintiff rested; when the defendant moved for a nonsuit on two grounds: 1st. That the executory devise over to Alexander Hill, the father of the plaintiff, was void for being too remote, and contemplating an indefinite failure of issue. 2d. That the limitation of said real estate over to Alexander Hill, the father of the plaintiff, was void as being repugnant to the absolute ownership and power of disposal given to Thomas Hill by the said will. The Circuit Judge sustained these objections, and decided that the action could not be maintained; and the plaintiff's counsel excepted.

The counsel for the plaintiff then offered to read in evidence the following instrument, the execution of which was admitted:

“Whereas, Alexander Hill, late of Cambridge, in the county of Washington, deceased, in and by his last will and testament, bearing date the twenty-second day of December, in the year of our Lord one thousand eight hundred and eight, did, among other things devise as follows, [reciting the clause of the will above set forth.] Now this

indenture made the sixteenth day of May, in the year of our Lord one thousand eight hundred and eighteen, between Alexander Hill of the town of Cambridge, in the county of Washington, son of James Hill of Cambridge, aforesaid, the persons named in the said in part recited will, of the first part, and Thomas Hill of Cambridge aforesaid, of the second part, witnesseth that the said party of the first part for and in consideration of the sum of one hundred dollars, money of account of the United States, to be paid as is hereinafter mentioned, hath granted, bargained, sold, released and quit-claimed, and by these presents doth grant, bargain, sell, release and quit-claim unto the said party of the second part, his heirs and assigns forever, all his right, title, claim, interest and demand of, in, to or out of the said real estate so devised to the said Thomas Hill, and in case of his death without lawful issue to the said Alexander Hill, his heirs and assigns. Together with all and singular the rights, members, privileges and appurtenances thereunto appertaining and belonging, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof. To have and to hold the same, to the said party of the second part, his heirs and assigns, upon the *express condition*, that the said party of the second part shall within four years from the date hereof, pay to the said party of the first part, his heirs, executors or administrators, the sum of one hundred dollars with interest, *and upon the further condition*, that if it shall happen that the said Thomas Hill shall die without lawful issue, then the said executors, administrators or assigns of the said Thomas shall pay to Alexander Hill the son of Peter Hill, and to Alexander Hill the son of Whiteside Hill, and to Alexander the son of Francis McLean, the sum of one hundred dollars each, and cause the said Alexander to be wholly exonerated therefrom according to the true intent and meaning of the aforesaid last

will and testament. And it is hereby mutually covenanted and agreed, that if it shall happen that the said Thomas shall die without lawful issue, and this last condition shall not be fully and completely performed within six months from his decease, then, and in that case, it shall and may be lawful for the party of the first part, his heirs or assigns to enter upon the said premises, and have, hold and enjoy the same as his and their own, without any let, hindrance or molestation of the party of the second part, his heirs or assigns. And it is further covenanted and agreed, that if it shall happen that the sum of one hundred dollars above mentioned to be paid, to the party of the first part, shall not be paid as above mentioned, it shall and may be lawful for the party of the first part, his heirs or assigns, to enter upon the premises so devised to the said Thomas Hill, and to hold and enjoy the same, until he or they shall have received the said sum with interest and costs out of the rents and profits thereof.

In witness whereof, the parties have hereunto set their hands and seals the day and year above written.

Signed, sealed and delivered in presence of J. Williams.

[Signed]

THOMAS HILL,
ALEXANDER HILL." [L. s.]

The plaintiff offered also to prove that the three legacies of one hundred dollars each mentioned in the will to be paid to Alexander the son of Peter Hill, to Alexander the son of Whiteside Hill, and to Alexander the son of Francis McLean, had not nor had any part of them, been paid, though payment of the same was demanded by the legatees, from the executors of Thomas Hill, eight months after the death of said Thomas Hill. It was conceded that the executors of said Thomas Hill did not know of the provisions in the agreement of 16th May, 1818, for the payment of said legacies, till about eight months after the death of said Thomas Hill. All this evidence was reject-

ed by the Circuit Judge, who directed a nonsuit to be entered. To which decision the plaintiff's counsel excepted, and moved for a new trial, on a bill of exceptions.

E. D. Culver, for the plaintiff.

Charles F. Ingalls, for the defendant.

By the Court, PARKER, J. The first question to be determined in this cause, is whether Alexander Hill, the son of James Hill and grandson of the testator, took any estate under the will. This depends upon the legal construction applicable to the language of the devise when the will took effect, which was in 1809. The testator devised the real estate to his son Thomas Hill, "and to his heirs and assigns forever," and added, "provided always and my will is, that the said Thomas shall not sell or convey the estate hereby devised to him, within fifteen years after my decease, unless such sale shall be made to some one of my children; and in case my said son Thomas shall die without lawful issue, then and in such case the said real estate is hereby given and devised to Alexander Hill my grandson, the son of James Hill, and to his heirs and assigns forever, subject to the payment of one hundred dollars to Alexander Hill the son of Peter Hill, when of age, of one hundred dollars also to my grandson Alexander Hill the son of Whiteside Hill, when of age, and one hundred dollars to my grandson Alexander the son of Francis McLean, when he comes of age."

It is claimed by the defendant's counsel that the executory devise over to Alexander Hill was void on two grounds: 1st. Because it is too remote, depending on an indefinite failure of issue; and 2dly, because it is repugnant to the absolute ownership and power of disposal given to Thomas Hill by the will.

1. Where a devise is limited on an indefinite failure of issue it is void because it may not vest within the compass of twenty-one years and nine months after a life or lives

in being. (4 Kent's Com. 17, 271. 1 Sid. 451. 1 Simons 173, 267. 11 Wend. 279.) An executory devise is not good, unless, by the contingency upon which it depends, the estate must necessarily, by the terms employed, vest within the time prescribed. Previous to the adoption of the revised statutes, it had been well settled by a long series of judicial decisions in England and this country, that where an executory devise was made dependent on the first taker's dying without issue, it meant an indefinite failure of issue, and not a failure of issue living at the death of such prior devisee. It is unnecessary for me to review the cases, or to state the reasons upon which they rested. This has been very fully and satisfactorily done by Ch. J. Savage, in *Patterson vs. Ellis*, (11 Wend. 259,) and by Chancellor Kent, (4 Kent's Com. 273.) In *Patterson vs. Ellis*, the words were *without leaving lawful issue*. In *Doe vs. Ellis*, (9 East, 382,) they were *without leaving issue*. The words in *Betts vs. Gillespie*, (5 Randolph 273,) were *without lawful issue*. These words, therefore, unexplained, had, previous to the change in the law made by the revised statutes, a fixed and definite legal signification, and were to be understood as meaning an indefinite failure of issue.

It sometimes happened, however, that there were other provisions in the will, authorizing the inference that the testator intended a failure of issue living at the death of the first taker; in which case the executory devise is sustainable. In this case the plaintiff claims that there is such an explanation of the testator's intent, in the fact that the executory devise in question was made subject to the payment of three several sums of one hundred dollars each to three other grantsons when they should respectively become of age. It is contended that these legacies being payable to persons then in being, the testator could not have contemplated a contingency that might have

happened after the expiration of twenty-one years beyond lives then in being, but must have intended it to have occurred on the death of Thomas. There are many cases where the courts have seized hold of a peculiar expression to take the case out of the general rule and give effect to an executory devise. And there are several in which the testator's intent has been gathered from the the character of the estate given over to the executory devisee, or the charges made upon it.

In *Roe vs. Jeffrey*, (7 T. R. 592,) decided in 1798, the devise was to A. for life, and after her decease to the testator's daughter M. for life, and after her death to his grandson T., son of W., and to his heirs forever; but in case his said grandson should *depart this life and leave no issue*, then the property to return to E., M. and S., three daughters of W., and the survivor or survivors of them, to be equally divided between them share and share alike. The court held that this meant a failure of issue at the death of the first taker, and not an indefinite failure of issue; and one of the reasons given by Lord Kenyon for this decision was, "for the persons to whom it was given over were then in existence, and life estates only are given to them." This case was approved by Sir Wm. Grant, master of the rolls, in *Barlow vs. Salter*, (17 Ves. 479,) decided in 1810, who said "when nothing but a life estate is given over, the failure of issue must necessarily be intended to be a failure within the compass of that life;" though he held that the same rule did not apply where the entire estate is given over to four persons, though one taker was confined to a life estate, it being provided that after her death it should go to the survivors.

But the case of *Doe vs. Webber*, (1 Barn. & Ald. 713,) decided in 1818, is still more like that under consideration. There the testator devised to his niece, Mary Hiles, and then proceeded as follows: "And my will is that in case

my niece Mary Hiles, shall happen to die, and leave no child or children, then my will is, and I give, devise and bequeath unto my niece, Jane Barnes, all my freehold land and tenements, called or known by the name of With-eridge and South Huckham, to her and her heirs forever, paying the sum of one thousand pounds of lawful money of Great Britain, unto the executor or executors of my niece, Mary Hiles, or to such person as she by her last will and testament shall direct." Lord Ellenborough, Ch. J., after holding that the words "leave no child or children," were equivalent to "dying without issue," said that the payment of the £1,000 being a personal provision, and being made to a person or persons appointed by Mary Hiles in her will, the event contemplated by the testatrix was an approximate and not a remote event, namely, a failure of issue at Mary Hiles' death, and not an indefinite failure of issue which might happen at any remote period.

The reasons given by Lord Ellenborough apply as fully to the case before us as to the one last cited. Here the legacies to which the executory devise is subject, were personal provisions for three of his grandsons then living, and by requiring payment to be made when they should severally become of age, it is evident the testator did not contemplate a remote event. There is in truth, more reason for saying so in this case than in *Doe vs. Webber*, where payment was not to be made to a person then living, but to the executors of a person then living. Here the persons to receive the payments were then living, and the payments were to be made at an early period of their lives, respectively.

I think, therefore, it is clear from the explanation thus given by the testator, that he did not mean the words "dying without lawful issue" should be taken in their usual legal sense, but that he intended by them a failure of issue at the time of his death.

2. It is next contended that the executory devise is void because repugnant to the absolute ownership and power of disposal given to Thomas Hill by the will.

It is true a valid executory devise cannot subsist under an absolute power of disposition in the first taker. So in *Jackson vs. Brewster*, (10 John. Rep. 19,) where B. by his last will, after devising a certain lot of land to his son Moses, his heirs and assigns forever, declared as follows: "In case my son Moses should die without lawful issue, the said property *he died possessed of*, I will to my son Y." &c. it was held the limitation over was void as being repugnant to the absolute ownership and power of disposal of the property given to Moses by the will. (See also *Jackson v. Delancy*, 13 John. Rep. 552; *Jackson vs. Robbins*, 16 Ib. 537; *Putnam vs. Ellis*, 11 Wend. Rep. 276; *Helmer vs. Shoemaker*, 22 Ib. 137; 4 Kent's Com. 270.) In all these cases of the giving to the first taker an absolute property, there was an attempt to give to the executory devisee such part of the property as should not be sold or disposed of by the first devisee. But the case before us is of a different character. To understand properly the estate devised to Thomas, all the parts of the devise must be considered together. It is true it commences by giving the property to him and his heirs forever; but this expression is qualified by the subsequent limitation. (*Doe vs. Ellis*, 9 East 382.) And I have already shown, in deciding the first point, that Thomas took only an estate determinable on his dying without issue living at the time of his death. The condition on which this estate is given—that Thomas shall not sell or convey it within fifteen years after the death of the testator—does not enlarge the estate. The testator did not devise the estate to Thomas, his heirs, &c. absolutely, but on two express conditions; one, that he should not die without lawful issue, and the other that he should not alien within fifteen years after

the death of the testator, except to some one of the testator's children. The *jus disponendi* was not therefore *absolute*, but *conditional*. If Thomas sold to one of his brothers within the fifteen years, or to any other person after that time, the grantee in either case would take the land subject to the same contingency, that is, the death of Thomas without lawful issue ; and upon the happening of that contingency, such grantee would be divested of the estate. I think, therefore, the second objection is not tenable.

3. Though not necessary to the decision of this cause, if I am right on both the first and second points, yet for greater caution, I proceed to consider the legal effect of the instrument executed by the parties on the 16th day of May, 1818. At that time Thomas Hill was in possession of the real estate in question, having entered under the devise to him in the will. His right to the possession at that time was not questioned, and could not be questioned under any construction of the language of the devise.—The instrument in question was a quit-claim deed, by which Alexander the son of James granted, bargained, sold, released and quit-claimed to Thomas Hill, all the interest he took under the will, for the consideration of one hundred dollars. This conveyance was however made dependent upon two conditions subsequent ; first, that Thomas Hill should pay the grantee the said sum of one hundred dollars, within four years from the date ; and secondly, the further condition that if Thomas Hill should die without lawful issue, his personal representatives should pay to the legatees mentioned in the will the three several legacies of one hundred dollars each, “and cause the said Alexander, to be wholly exonerated therefrom according to the true intent and meaning of the aforesaid last will and testament.” To this was added a covenant that if the said Thomas should die without lawful issue,

and if this last condition should not be fully and completely performed within six months from his decease, it should be lawful for the grantee, his heirs and assigns, to enter upon the said premises, and have, hold and enjoy the same as his and their own. A further covenant provided, that if the said sum of one hundred dollars was not paid to the grantee, he might enter upon and hold said premises, till he should have received the said sum and interest out of the rents and profits. This instrument was signed and sealed by both the parties to it. It is claimed that this instrument operates as an estoppel, and precludes the defendants' questioning the plaintiff's title. Lord Coke divides estoppels into three kinds, viz: by matter of record, as by letters patent, fine, common recovery and pleading; by matter in writing, as by deed indented; and by matter *in pais*, as by livery, by entry, by acceptance of rent, and by partition. (Co. Litt. 352, a.)

The mere taking of a quit-claim deed would not have estopped Thomas Hill from questioning the title of his grantor. Thomas Hill did not enter under the quit-claim deed. He was already in possession, and had a right to protect himself against litigation by buying in claims made by others, without invalidating his legal rights, or subjecting himself to any allegiance to others. The rule is otherwise, as between vendor and vendee before conveyance, and between landlord and tenant. In both these cases the possession must first be surrendered, before the title can be questioned. The rule is now well established that there is no estoppel except where the occupant is under an obligation, express or implied, to restore the possession at some time, or in some event. (Jackson vs. Spear, 7 Wend. 401. Jackson vs. Leck, 12 Ib. 105. Osterhout vs. Shoemaker, 3 Hill, 513.) The only exception to this rule has been that in ejectment for dower, the grantee of the husband was estopped from denying the

grantor's title. *Sherwood vs. Vandenburg*, 2 Hill, 303. *Browne vs. Potter*, 17 Wend. 164.) And even this exception has been recently overruled by the Court of Appeals, in *Sparrow vs. Kingman*, (1 Comstock's Rep. 242.)

But Thomas Hill went beyond the mere taking of a deed. He covenanted that if the second condition subsequent was not performed within six months from his decease, his grantor, his heirs or assigns, might enter upon and hold and enjoy the premises. The plaintiff does not rest upon an estoppel *in pais*, but on an estoppel *by matter in writing, by deed indented*. The parties have mutually adjusted their legal rights, by indenture fully executed between them, and are mutually estopped from questioning it. Thomas Hill might perhaps have stood upon his title under the will, if he had not chosen to surrender it. Having covenanted to yield up the possession on a certain condition, he is as much bound to do so as if he had become the tenant of the executory devisee, by attorning to him, paying him rent, and agreeing to restore the possession at the end of the stipulated term.

It is said this covenant by Thomas Hill is without consideration, because the grantors had no legal interest in the premises. I have come to a different conclusion. But suppose the executory devise to be void. Yet under it Alexander made a claim to the premises. The validity of that claim depended upon a construction of the will, perhaps uncertain and difficult—certainly unsettled—between the parties. Thomas Hill had a right to settle that claim for himself. If nothing more, to buy his peace by avoiding a lawsuit; and with as full a knowledge of his legal rights as the other party, he entered into the agreement before us. He agreed to pay, and did pay, one hundred dollars for the release in question, and agreed also to pay the three legacies of one hundred dollars each, to which the executory devise was subject, and as a fur-

ther consideration covenanted that the executory devise might take the possession if he failed to pay. The possession must follow the agreement. Where a party is estopped by a deed, all persons claiming under or through him are equally bound by the estoppel. (*Stow vs. Wyse*, 7 Conn. Rep. 214.)

The defendant may perhaps be entitled to equitable relief, by showing some sufficient excuse for non-payment of the legacies at the time agreed upon, and by tender of performance of the condition. But in this suit we can regard only the the strict legal right.

I think, therefore, the Circuit Judge erred in directing a nonsuit, and that a new trial should be granted; costs to abide the event.

New trial granted.

Law Miscellany.

ATTORNEYS AS WITNESSES.

An eminent member of the Pittsburg Bar encloses the following proceedings in the District Court of Allegheny, as "a nut to crack in the next number of the American Law Journal." We may say, with the author of *Agnes Grey*, that the "dry shrivelled kernel scarcely compensates for the trouble of cracking the nut." The nauseous substance will prove any thing but healthy in its influence upon the Bench and the Bar. It is, however, the legitimate fruit of the seed recently sown by one of the Judges of the Supreme Court. The practice of permitting attorneys to become witnesses has been designated as an "indecent practice which ought to be discountenanced by the courts." But we are told that the court which exercised "*the power*" to overturn the whole current of decisions on the subject of *assignors of choses in action* becoming witnesses has not "the power" to prevent an "indecent practice" by excluding attorneys from becoming witnesses for their clients. The result is, the suggestion made by the estimable Judge of the District Court of Allegheny. If the mountain cannot go to Mahomet, the Prophet may go to the mountain. If the courts have no power to prevent counsellors from becoming witnesses they may, it seems, make a rule to prevent witnesses

from "acting further as counsel." According to this system, an attorney may receive a fee in a cause—may consult and advise upon all measures necessary to the defeat of his adversary—may labor nights and days in the preparation for trial, and may aid on the trial of the cause, assisting in examining and cross-examining the witnesses, and in all the arguments upon the admission and rejection of evidence, and, at the close of the testimony, when the time for "*pinning the basket*" arrives, he may become a witness for his client on condition that he shall "cease to act further as counsel!" This process of purification, it is thought, will save the Halls of Justice from the desecration so strongly and so universally condemned! The whole proceeding is so transparent that any one can see through it. It only makes the matter worse. Instead of telling the client at once that he shall not place his witnesses in a position to destroy their reputations—that he shall not lead them into temptation by engaging their services as advocates in causes in which their testimony is required, the rights of the attorney are to be disregarded. It must be remembered that it is not always the fault of the attorney that he is called as a witness. If he is a competent witness, *his client has a right to call him*, and the attorney is compelled, against his wishes, to become a witness. Thus, at the will of a client who cares not a straw for the feelings or the reputation of his advocate, the latter is compelled to do that which is made the ground for arresting him in the further pursuit of his lawful calling, and thereby depriving him of "the means whereby he lives." We have reason to remember a case in point. A lawyer was engaged in an important cause. He spent years in the preparation—aided in a long and tedious trial, and, after many days labor and anxious zeal in sustaining his client's interests in court, he was perversely and obstinately called as a witness by his client. He obeyed the mandate of the court, gave his evidence, and then, as the only means of relieving himself from his embarrassing position, relinquished all compensation for his long and arduous services and declined any further participation in the trial.

If the courts of original jurisdiction cannot be sustained in holding that the duties of *advocate* and *witness* are incompatible, and that the client, by employing a particular individual as his advocate, *waives his right to make use of him as a witness*, let a course be taken which shall have some respect for the rights and interests of the attorney. If a "rule of court" can be of service, let one be adopted similar to that which prohibits attorneys from becoming special bail. Let us have a rule of court prohibiting a party from calling as a witness in chief the professional advisers employed as his counsel in the cause.

In the District Court of Allegheny county, Pa., before Judge LOWME, December 13, 1849:

James L. Morrison vs. Abraham M'Elfesh.—In the trial of this cause,

R. Woods, Esq., counsel for defendant, offered F. C. Flannigan, his colleague in the cause, as a witness to prove a fact. Objection being made by Wilson M'Candless, Esq., that the witness offered was of counsel in the case, the court ruled: That there was no difference in legal competency as witnesses, between *legal* and *commercial agents*; the most that courts could do on this subject would be, to make a rule, that when it became necessary to use the testimony of counsel in a case, he should cease acting further as counsel, and become a witness merely.

ELECTION OF JUDGES.

The "proposed amendment" of the Constitution of Pennsylvania, which provides for the election of Judges by the people, it will be remembered, was agreed to by a majority of the members elected to each House, at the last session of the Legislature. It has been published in each county, as required by the Constitution. The next step is to submit it "to the present Legislature; and if such *proposed amendment shall be agreed to* by a majority of the members elected to each House," it is to be again published and submitted to the people for their ratification, "at least three months after being so agreed to by the two Houses." A good deal of excitement appears to exist, arising from the fear that an attempt will be made to prevent the *direct* and *constitutional* action of the two Houses on the "*proposed amendment*" by an offer to *amend the "proposed amendment."* The "two Houses," in this matter, are not acting under their general legislative powers. They are merely taking the preliminary steps necessary to submit an amendment of the fundamental law to THE PEOPLE. The present two Houses have only a *special* and *limited* authority. They must either *agree or disagree* to the "proposed amendment" as it came from the "two Houses" of last session. Nothing else is submitted to the two Houses of the present Legislature. They have no right to *amend* the "*proposed amendment.*" A motion to do so would be out of order, and ought not to be entertained by the Speaker. If the "*proposed amendment*" is not proper, the honest and manly course is to kill it by an open and direct vote.

Among the arguments used to defeat this measure we have heard it suggested that there are *other* amendments of greater importance, which will be postponed for five years, unless they are added, as amendments to the amendment now proposed. Nonsense. Any *other* amendment may be submitted at any time. The restriction is that "no amendment or amendments shall be submitted to the people oftener than once in five years." That is the decision of the people, on any amendment or amend-

ments proposed, shall put the amendments so decided upon to rest for five years. But this does not prevent the people from acting upon other amendments never before proposed. It would be perfectly Constitutional to submit to the people next year an amendment providing for the substitution of triennial for annual sessions of the Legislature. It could not be said that that amendment had been submitted "oftener than once in five years." The action of the people on any amendment relative to the Judiciary would be no bar to their action on one which related to the Legislature. Even if there existed a doubt on the subject, the rule of interpretation most in favor of the rights of the people to amend their own form of government should unquestionably be adopted.

THE DEMOCRATIC PRINCIPLE OF CONSTRUCTION.

In the contests for party ascendancy we hear so much of names, forms, discipline, and usages that we lose sight of the *principle of construction* on which the two parties which alternately control the Government, differ. In a beautiful work recently published, entitled "*Sketches of the Lives of the Members of the Pennsylvania Legislature (of) 1849, by George Franklin Emerson,*" we find the following reference to this principle embodied in the sketch of Gen. W. F. PACKER, the talented Speaker of the late House of Representatives, (now a member of the Senate.) It is given merely as an "embodiment" of Democratic views on the construction of the Federal Constitution, and as possessing peculiar interest at this time when the Slave question assumes an aspect as threatening now as the Tariff question did in the days of South Carolina nullification :

"He is no empty talker about names and forms, but an energetic actor, following the substance and not the shadow. Springing from the people, he is always ready to do battle for their rights. Looking to them as the legitimate source of all political authority, he is ready to trust them with every power consistent with representative government. Aware of the nature of the federal compact, and of the unwillingness of the early statesmen of democracy to trust the central government with any but a limited authority, he is ever ready to stand by the State sovereignties in confining the General Government strictly within the powers granted by the Federal Constitution. Men of eminence in the party to which General Packer belongs, may occasionally differ in the application of principles to particular cases; but all politicians, of the genuine Democratic school, subscribe to the great fundamental doctrine of the party, that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Upon this great fundamental principle hang all the doctrines of the Democratic party. Upon the steady support of this principle the permanency

of the Union and the liberties of the people depend. Every extension of territory, and every increase of the great sisterhood of nations of which our glorious confederacy is composed, is but a new demand upon the patriot for a vigilant and energetic support of the ancient, safe, and chief principle of the Democratic party, *a strict construction of the Federal Constitution*. So long as this principle of construction be adhered to by our public authorities, and by those who clothe them with power, the rights of the people and of the States, will be protected against the usurping tendencies of a great central government. With this principle constantly before us, and with our public men able and willing to maintain it, either in the legislative hall, or in the judicial forum, we can have no fears of nullification or consolidation; but our great and glorious Union, standing as an illustrious example of the capacity of the people for self-government, shall not only secure its own greatness and perpetuity, but shall light all the nations of the earth in their onward march to freedom."

THE POWERS OF THE UNITED STATES SENATE.

The following extract relates to the celebrated *expunging* resolution :—

"The ball which had been set in motion by a distinguished Senator, solitary and alone, after rolling for years, at last arrived at its goal, and an important principle, regulating the distribution of power, under the Federal Constitution, was affirmed. The Senate of the United States, in addition to its general *legislative* power, has a voice in the ratification of treaties and in the *confirmation* of appointments to office, and constitutes, besides, a court for the trial of such impeachments as shall be preferred by the representatives of the people. These are the legitimate powers of the Senate, and all its acts, direct and incidental, in the *discharge* of any of these duties, when entered upon its journal, constitute a RECORD, which, right or wrong, can never be expunged without a violation of the Constitution. But if that body shall *suspend the exercise of its constitutional functions*, for the purpose of entering upon its journals the condemnation of another department of the government, of equal powers and equally entitled to *respectful consideration*, the opinion, so entered, not being incidental to the *enactment* of any law—the *ratification* of any treaty—the *confirmation* of any appointment, or the *trial* of any impeachment, is UNAUTHORIZED BY THE CONSTITUTION—NOT PROPERLY OFFICIAL—HAS NO BINDING FORCE—AND MAY, ON BETTER CONSIDERATION, BE EXPUNGED."

JUDICIAL IRONY.

Mr. Justice BRONSON, of the N. Y. Court of Appeals, on delivering the opinion of the Court in *Sparrow vs. Kingman*, 1 Coms. 259, makes the following remarks :

"The defendant's counsel place great reliance upon a remark of Mr.

Justice Cowen, to the effect, that although the point was too firmly established to be revised by the Supreme Court, it might still be a fit question for review in the Court of Errors. There was, I think, a good deal of irony in that remark. Surely the learned Judge did not intend to be understood, that what was settled law in one court, was not also good law in all the other courts of the State; that a Justice of the Supreme Court when sitting in a Court of Errors, was at liberty to decide the other way. The thing is preposterous. The remark in question was made concerning a court which not only corrected erroneous decisions, but sometimes took the liberty of reforming the law itself, where it was supposed to need improvement. I claim no such prerogative. I am of opinion that the judgment of the Supreme Court should be affirmed."

PROFESSIONAL ETHICS.

By a singular coincidence the January numbers of three Law Journals, published in different parts of the United States, contain articles on the subject of professional ethics. And the London Times of the 20th November last, contains a correspondence between the celebrated Counsellor Phillips & Samuel Warren, Esq., from which it appears that the charge made against the professional conduct of Mr. Phillips in defending Courvoisier, (who was charged with the murder of his master, Lord William Russell,) by attempting to show after the prisoner had confessed his guilt to Mr. Phillips, that the crime was committed by the other servants of his Lordship, is entirely disproved upon the authority of Mr. Baron Parke. The high reputation which Counsellor Phillips enjoys in the United States renders this refutation of a slander which has passed unnoticed for nine years particularly gratifying to the profession in this country. When we can spare the space the correspondence will be given in the American Law Journal.

THE NEW STATE OF DESERET.

Some years ago a man named Joseph Smith announced to the world that through a Divine Revelation he had found embedded in the Earth, on a farm near Palmyra, in the State of New York, a number of gold plates, on which were written, in an unknown tongue, certain portions of Holy Scriptures entirely unknown to the Christians of the present day. The contents of these plates were translated by Joseph Smith, as he said, through the agency of a revelation. and this translation, being pub-

lished, forms, with additional revelations from time to time by the Prophet Joseph Smith, the ground work of the Mormon Faith. The converts to this new religion, being persecuted for their singular combination of follies and vices, sent missionaries all over the world and increased greatly in numbers. Driven from one settlement to another they have at last located themselves near the borders of the Pacific Ocean and formed themselves into a new State now applying for admission into the Federal Union, by the name of the "*State of Deseret*." The following extract from their Constitution will give some idea of the location and boundaries of this proposed member of our Union :

"We, the people, grateful to the Supreme Being, for the blessings hitherto enjoyed, and feeling our dependence on Him for a continuance of those blessings, do ordain and establish a free and independent government, by the name of the State of Deseret, including all the territory of the United States within the following boundaries, to wit : commencing at the 33d degree of north latitude, where it crosses the 108th degree of longitude west of Greenwich ; thence running south and west to the northern boundary of Mexico ; thence west to and down the main channel of the Gila river, on the northern line of Mexico, and on the northern boundary of Lower California, to the Pacific Ocean ; thence along the coast northwesterly to 118 deg. 30 min. of west longitude ; thence north to where said lines intersect the dividing ridge of the Sierra Nevada mountains ; thence north along the summit of the Sierra Nevada mountains to the dividing range of mountains that separates the waters flowing into the Columbia river from the waters running into the Great Basin ; thence easterly along the dividing range of mountains that separates said waters flowing into the Great Basin on the south, to the summit of the Wind River chain of mountains ; thence southeast and south by the dividing range of mountains that separates the waters flowing into the Gulf of Mexico from the waters flowing into the Gulf of California ; to the place of beginning, as set forth in a map drawn by Charles Preuss, and published by order of the Senate of the United States in 1848."

NEW YORK STATE LIBRARY.

We are indebted to our distinguished friend Dr. T. ROMEYN BECK, Secretary of the Regents of the University of New York, for a printed Catalogue of the Law Books in the *New York State Library*, for 1849.—The leading object of the Trustees of the Library has been to accumulate all the volumes of American Law Reports, and they appear to have been so far successful that only two or three remain to be procured. The *Catalogue* itself is a neatly printed octavo volume of 376 pages, and must be exceedingly useful to those who have access to the Library. The names of the different authors of treatises and reporters of decisions are

arranged in alphabetical order in the first part of the Catalogue, accompanied with a brief statement of the titles and the year and place of publication. This occupies 245 pages of the work. Then follows a list of the same works arranged according to the subjects. This is according to the plan of Watt's *Bibliothica Britannica*, a work of inestimable value which engaged the unwearied care and indefatigable labor of Dr. Watts for nearly 20 years! Whoever has prepared the Catalogue for the New York Library has performed a service for which he deserves a most ample reward. Why is it that no such Catalogue is published of the Library of Pennsylvania? It would be satisfactory to the people to know what books they have obtained for their money; and those who have occasion to resort to the Library would be greatly aided by the possession of such a Catalogue as that published by our sister State.

New Publications.

BARR'S PENNSYLVANIA STATE REPORTS.

The 10th volume of these Reports has made its appearance. The estimable Reporter, ROBERT M. BARR, Esq., has departed this life, and we presume that this is the last volume to be published under his name, unless some friendly brother in the profession should undertake to report for the benefit of the family of the deceased during the remainder of his term. Mr. Barr was appointed under the act of 11th April, 1845, for the term of five years. According to the statute, the Governor confers the appointment, and has the power of removal, "for incompetency or a failure to discharge his official duties, on the address of the Judges of the Supreme Court in writing." The Governor is also authorised to fill "any vacancy which may occur by *death*," by an appointment for the unexpired term.

The volume before us is handsomely executed, and contains 559 pages, being nine pages more than required by the act of Assembly. This does not, however, fully compensate for the deficiency of six lines per page, which will be perceived on comparing this volume with that of 9 Watts & Sergeant which seems to have been made by the Legislature the standard. There is still a deficiency of nearly 70 pages per volume.

In *Lefever vs. Witmer*, 10 Barr 505, we perceive that the Chief Justice has expunged from his original opinion the declaration that the Court below "had no right to appoint a sequestrator," in the case of a levy on a life estate, as reported in 2 *American Law Journal* 40. We are gratified at this; because as the case was one over which the Supreme

Court admitted that it had no jurisdiction, and for that reason quashed the appeal, the impolicy of expressing an unauthorized opinion, in opposition to the authorized decision of the tribunal which had final jurisdiction, must be manifest at a blush. The inconvenience of such a course is increased by the *possibility* that the court below, in the exercise of its undoubted authority, might be found to be in the right, and in such case would of course adhere to its opinion, and thus might be placed in a position of seeming disrespect to the higher tribunal. Great care should be taken to preserve the utmost good feeling between the courts of original and those of appellate jurisdiction. Where this is not the case there is danger to the rights of the suitor.

In *Com. vs. Stouffer*, p. 353, the court below is made to speak of the "*celastic* embrace of the mountain Kalmia." The error will readily be detected by the observer of Nature who has witnessed how beautifully the stamens of the laurel blossom are bound down in the bottom of the corolla, until they acquire sufficient maturity to burst their bonds and spring upwards towards the pistil, shedding the pollen upon it in the process of reproduction. The word *celastic* should be substituted for "*celastic*."

There are many interesting and valuable opinions in this volume of Reports and we cordially recommend it to the profession.

Zabriskie's Reports of Cases determined in the Supreme Court of Judicature of the State of New Jersey—Vol. 1—Parts 2 & 3.—These Reports cover the period from July Term 1847, to October Term 1848. So far as we are prepared to decide, from a hasty examination, the cases appear to be well reported, and the decisions do credit to the Judicial ability of New Jersey. But can Mr. Fitz Randolph, the printer at New Brunswick, inform us why he uses different qualities of paper in the same volume? Some of the forms appear to be printed on paper exceedingly smooth, strong and fine, while other portions of the work are printed on paper of a quality comparatively quite inferior. The contrast exhibits the work at a disadvantage.

ERRATUM.

The opinion of the Court of Common Pleas, in *Hadden vs. Recside*, adopted by the Supreme Court, December No. Journal, page 263, was delivered by the Hon. N. Ewing, late President Judge, and not by his successor Judge Gilmore.

THE
AMERICAN LAW JOURNAL.

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MARCH, 1850.  
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United States District Court—Portland, Maine.

SKOLFIELD, *Libellant*, vs. POTTER *et al.*

1. When a vessel is let to the master to be employed by him, and he to pay to the owners a certain portion of her earnings, the owners will be liable to the seamen for their wages, though by the agreement the master is to have the entire control of the vessel—to victual and man, and furnish supplies at his own expense, unless at the time of shipping, this contract is made known to them, and they are informed that they are to look to the master as the only owner.

2. The money that is paid over by the master, is paid as freight, and the owners as receivers, and having an interest in the freight, are liable to seamen for the wages.

3. The freight is hypothecated for the wages, and every part of the freight is liable for the whole wages. The owners, who have received freight under such a contract with the master, are liable for wages to the full amount of the freight in their hands, and not merely *pro rata* in proportion to what they have received.

4. The merchandise is bound to the ship for the freight, and the freight to the seamen for their wages.

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5. When the owners of the ship are also the owners of the cargo, the cargo owes freight to the ship, and this freight is pledged for the wages.

6. The decision in the case of *Poland v. The Spartau*, reviewed and affirmed.

June 9, 1849.—This was a libel in personam against the owners of the schooner *Arrowsic*, for seamen's wages.—The libellant shipped at the port of Bath, as mate, on the 22d of September, 1848, on a general trading voyage, and continued on board, and did duty, as mate of the vessel, in several voyages, two of which were to foreign ports, until the return of the vessel to Bath, on the second of May following. On his discharge, the master delivered to him a barrel of flour, part of the cargo belonging to the owners, and gave him an order on the owners for the balance of his wages due, amounting to \$128, including the flour. The owners paid him \$25 on the presentment of the order, and promised to pay him the residue in a few days. But after calling on them several times, and being put off from time to time, he sued out a libel. The owners, in their answer, not denying that the services have been rendered, set forth a defensive allegation, denying their liabilities for the wages. The defence relied upon is, that the vessel was let to the master on a verbal agreement that he was to have the use and control of the vessel, to employ her as he should choose—he to victual and man her at his own charge, and to pay them for the use and charter of the vessel, one half of her gross earnings, deducting one half of port charges. It was contended, that having by this contract parted with the possession or control of the vessel, the master became owner for the voyage, or the term during which the master employed her under this contract, and as such was exclusively liable for supplies and seamen's wages, and that they, as the general owners, were exempted from all liabilities for these charges.

J. M. Adams, for the Libellant. P. Barnes for the Respondents.

WARE, D. J. It is admitted in this case, that the services have been performed, and that wages are due.—Some question was made on the evidence as to the balance that remains unpaid. Two charges of ten dollars each, made by the master for money advanced before the termination of the service, are objected to by the libellant. To prove these, the master produced his memorandum book, in which these sums were charged; and this, with his suppletory oath, would be sufficient as *prima facie* evidence, even if the suit were against the master himself. They stand charged in the same book, which contains all the other charges, which are not objected to, and which agree with the account kept by the libellant himself.—They are the two last charges in the account, and at the time of his discharge, the parties came to a settlement, and a draft or order was given and accepted by the mate for the balance found due. In this settlement these sums were allowed, and it appears without objection at the time. I see no objection to their allowance now.

The important question in the case is, however, whether the respondents are liable for the wages. The schooner was let by a parol contract, by which the master, as hirer, was to have the possession and control of the vessel—was to navigate, to victual and man her at his own charge, and employ her in such business as he should choose, and to render to the owners for the use of the vessel, one half of her earnings. It was objected at the argument that it was not competent to a party to prove such a lease of a vessel by parol evidence, at least to affect the rights of third persons. It is true that by the general maritime law, it is held that the title to vessels must be shown by writings, *The Sisters vs. Robison* 159, and the contract of letting and hiring also should regularly be, and usually is, proved by a charter party in writing. But it has been held by a variety of decisions in this country, that such

a parol lease is valid not only between the parties, but to conclude the rights of third persons, who are strangers to it.

It seems also to be settled by the general current of the decisions, that under a letting of the vessel herself, whether by a written charter or parol contract, when the possession of the vessel is transferred to the hirer, and he appoints the master and crew, and sails her at his own expense, and has the entire control, that he is to be considered, with respect to third persons contracting with the master, as the owner, and that he succeeds to all the rights and liabilities of the owners. The general owners or proprietors have then no lien on the merchandize for freight, nor are they personally liable for supplies furnished to the vessel on the contract of the master, but the hirer is substituted in their place, both as to their rights and liabilities. 3 Kent's Com. 136. Conkling's Jurisdiction, Law and Practice of the Admiralty, 135. Nor does it make any difference, according to the decisions, though the charterer goes himself as master. *Reeve vs. Davis*, 1 Adol. & Ellis 135, 23 E. C. L. R. 95. The cases in this country go further, and decide when a vessel is taken by the master on the terms that this was, and he is to have the control, and direct the employment of her, and the earnings to be divided between him and the owners; that this is to be considered as a lease or charter of the vessel. The master is held, under such an agreement, to be the special owner, and the general owners not liable on his contracts for supplies furnished the vessel while thus employed. *Taggard vs. Loring*, 16 Mass. R. 336. *Emery vs. Hersey*, 4 Greenl. 407. *Thompson vs. Hamilton* 12 Pick. 425. *Cutler vs. Thurlo*, 20 Maine 213. *Thompson vs. Snow*, 4 Greenleaf 264. *Cutler vs. Winsor*, 5 Pick. 335.

But it is evident, when the owners put their vessel into the possession of the master on such terms, that the con-

tract is of a mixed and somewhat ambiguous character.—In one aspect, it may be considered as a charter of the vessel, and this as a mode adapted to determine the amount of the charter or hire to be paid. Viewed in another light, it partakes of the nature of a partnership, in which one partner furnishes the capital and the other contributes his time and labor in the transaction of the business, and the profits to be divided. In a third view, it may be considered as a contract of hiring of the master, he to receive a share of the earnings of the vessel, instead of a certain and stipulated sum for his wages. In the various cases in which the subject has been brought before the courts for adjudication, it has been presented in these various lights; and without any great violation of legal analogies or legal principles, the contract may be considered as belonging to one class or the other. In a case before Lord Ellenborough, (*Dry vs. Boswell*, 1 Camp. 329,) the evidence first offered, being that the owners and master were to share equally in the profits, he declared that it was a partnership adventure, and that the master and owners were liable as co-partners; a joint participation of profit and loss constituting a partnership; and when on further evidence, it appeared that the master was to have a share of the gross earnings, and not to be liable for losses, he pronounced it to be a contract of hiring of the master by the owners, and that this was only a mode of determining the amount of his wages. Generally, however, the courts have considered the contract as a charter of the vessel, and the master as owner for the voyage; and as a corollary from this decision, it is held that the general owners are not liable for the master's contracts for supplies and repairs in the course of the voyage.

But though this is the general language of the authorities, there are exceptions. The case of *Rich vs. Coe*, Cowper 636, is a strong decision the other way. Lord

Mansfield, in delivering the unanimous opinion of the court in that case, observed, that whoever furnished supplies to a vessel on a contract made by the master, has a threefold security. 1. The person of the master. 2. The specific ship. 3. The personal liability of the owners:—and he added, that it makes no difference in the liability of the owners, that there is a private agreement between them and the master, by which he is to furnish the supplies and keep the ship in repair, unless the creditor has notice of the contract, and gives credit to the master individually.* The doctrine of Lord Mansfield seems to have been entirely satisfactory to Mr. Justice Story, for in his treatise on Agency, §298, he states the law nearly in the words of this great master of maritime law, though the more recent decisions, which seem materially to qualify, if they do not directly overrule the doctrine, must have been quite familiar to his mind. Indeed, with respect to some of them, he has on other occasions not hesitated to express his doubts in very pointed terms. *Arthur vs. The Cassius*, 2 Story Rep. 93. *The Nathaniel Hooper*, 3 Sum. R. 577—and Chancellor Kent, though he seems to have yielded to the authority of the later decisions, expresses his own opinion in terms very nearly, if not entirely, agreeing with the doctrine of Lord Mansfield. “To whom was the credit given, seems to be the true ground on which the question ought to stand.” 3 Comm. 135.

Now if this contract between the hirer and the owners is not known, the supplies are always furnished on the personal credit of the owners, as well as on that of the master. In the opinion, therefore, of Chancellor Kent, as well as of Judge Story and Lord Mansfield, although the owners have let their ship by a charter party, under which the master, if he is the hirer, is bound to bear all

*In the case of *Reeves vs. Davis*, 1 Adol. & Ellis, which seems directly to overrule this decision, the case itself was not referred to either by the counsel or the Court.

the expenses of supplies, they ought to be held bound to third persons on the master's contracts, which fall within the scope of his ordinary authority as master, unless this private agreement is made known; for if it is not, supplies are always furnished on the credit of the owners. The owners, by putting the master in possession of the vessel, hold him out to all who are ignorant of the special contract, or at least enable him to hold himself out as authorized to bind them personally, by all contracts relating to the usual employment of the vessel. And if any one must suffer from his acts, it is more reasonable that the loss should fall on them than on strangers, who have given him credit on the ground of his official character.

It is admitted, however, that the current of judicial decisions is in favor of exempting the owners from their liability for ordinary supplies, while the vessel is employed under such a contract. But no decision has yet gone so far as to relieve them from their liability for seamen's wages. *Curtis' Rights & Duties of Seamen*, p. 336. The seaman have always this tripple security, besides a direct hypothecary interest in the freight; and in all ages of the maritime law, their claim for wages has been highly favored, both on the ground of general commercial policy, and from the consideration of their own habits of carelessness and characteristic improvidence. They habitually enter into their engagements in reliance on these securities, and they ought not, on principles of public policy and natural justice, to be deprived of them by any refined and subtle distinctions of law, which are so alien from all their habits of thought and action.

This form of contract, of letting vessels to the master, to be employed on shares, has become very common in this part of the country, especially with respect to small vessels employed in the coasting trade. The master to whom the vessel is entrusted by the owners, is usually an

enterprising and industrious young man, but ordinarily of limited pecuniary responsibility; for as soon as he acquires sufficient capital or credit, he becomes a part owner himself. These contracts are almost invariably by parol, and the terms are settled by a well understood usage.—The master, under the usage, is to bear the whole expense of victualling and manning her. The port charges in the various ports visited, are first to be paid from the gross earnings of the vessel, and the balance of the freight is to be divided in equal shares between the master and owners. The seamen often, and perhaps usually, have no knowledge of this private contract between the master and owners, and they engage their services in reliance upon the ordinary security, which the general marine law gives them. It is admitted that the weight of the authorities is in favor of exempting the owners from their liability for ordinary supplies, while the vessel is employed under such a contract.

If this mode of letting the ship to the master, to be employed on shares, relieves the owners from their liability for wages, the contract will operate on the seamen, probably, in the great majority of instances, as a perfect surprise. After the termination of his service, he finds one part, and an important part, of his security, the personal liability of the owner, is gone, under a private contract unknown to him; and that of the master may be, and often will be worthless. There remain, it is true, the freight and the vessel, but the freight is received from time to time, and there may be, and usually is, little remaining due at the end of his service. The ship is indeed an ample security. But since the act of March 3, 1847, ch. 55, respecting costs in admiralty proceedings *in rem*, by which all costs are denied to the libellant, except for the payment of witnesses, unless he recovers more than one hundred dollars, the remedy against the vessel for all useful

purposes, is taken away, when the suit is for less than the sum named. And in these coasting and trading voyages, the balance of wages will rarely amount to so much as one hundred dollars. The consequence will be, that practically the seamen will have for their security nothing beyond the personal liability of the master.

No judicial decision has yet extended this modern doctrine so as to deprive the seamen of their ancient right of recourse against the owners. The whole doctrine in the cases, to which it has been applied, is not free from difficulties on the principles of our law, except with the limitation mentioned by Lord Mansfield, that the creditor is notified of the non liability of the owners at the time the credit is given. Because, when he contracts with the master, he has always a right to believe that he is contracting with the owners, if he is not advised to the contrary. If he is informed, and then gives credit, he knows to what security he trusts. To extend the principle so as to bar the right of the seamen, would be repugnant to the general spirit of the maritime law, which has studiously provided in their favor the greatest security for their wages. I am unwilling to be the first Judge to give it that extension. Indeed, the original doctrine of Lord Mansfield, appears to me to be the most just, and most in harmony with the general principles of our law. The master, by the known rules of law, represents the owners as their agent, and is authorized to bind them by all contracts relating to the usual employment of the ship. The seamen enter into their engagements with the full confidence that the owners are bound for their wages. If it must be admitted that the decision of Lord Mansfield is overruled by the latter decisions, these go no farther than to exempt the owners from their liability for supplies furnished by men, who are in the habit of looking well to their securities. Rather than extend these decisions by

analogy, to the claims of the crew, unless I can clearly see that on principle, the owners are exonerated, I am ready to say, *Malo cum Platone errare*—I will not add, *quam cum ceteris vera sentire*—sooner than follow the analogies of decisions, the soundness of which is so questionable, and carry them out, to the exclusion of the seamen from their recourse against the owners, unless at the time of their engagement they are plainly told that they are to look to the master as the only owner. The concealment of a fact of such importance is a fraud on the men.

But I do not put the decision of the case on this ground alone. There is another on which I think the owners are bound for the wages.

By the ancient maritime law, the title of seamen to wages, is made to depend on the issue of the adventure, for which they are engaged. Unlike other contracts of hiring their right to compensation does not depend alone on the fidelity and skill with which they perform the services for which they engage; but with whatever perseverance and courage they exert themselves, their right to compensation is suspended on contingencies, which may affect the ultimate result of the voyage; it is made dependent on what has been termed the fortune of the vessel. What then is this fortune to which the seamen must look? The ship, says Emerigon, in the condition in which she was at the time of her departure from the port of outfit, together with all the freight which is gained in the course of the voyage, form that fortune of the vessel which constitutes the pledge to the seamen for their wages. *Trait Des Assurances*, ch. 17, sec. 11. The privileged hypothecation, then, he adds, allowed to the mariners, comprehends every part of the ship and every part of the freight, according to the nature of hypothecation, which is *tota in toto et—tota in qualibet parte*. Their privileged line is entire over the whole, and is entire in every part. The ship and the

freight, with respect to wages, form one mass, and all that remains of either, at the end of the voyage, is pledged for their payment. The contract of the mariners, Emerigon goes on to say, is a species of co-partnership. It is not indeed a partnership as to all the effects of that contract, but as to some of its consequences; for the seamen have no claim to a remuneration, but to the extent of the effects embarked in the enterprise, which they bring home. If all is lost, the mariners lose their wages, and they cannot then enforce the payment by a personal action against the master or owners. But if all is not lost, whatever remains of the ship or freight, is specifically pledged for their payment. Freight earned and put ashore, is saved from the effect of a supervening shipwreck, by which all that remains is lost. It is a partnership fund, that has entered the common chest, and is hypothecated to the seamen for their wages.

It is now more than twenty years since I was first called upon to examine this right of the seamen to claim their wages out of the earnings of the vessel. It was in the very ably contested case of *Poland vs. The Spartan*, Ware Rep. 145-6. In that case, it was held, that when goods of the owners themselves are shipped, they owed freight to the vessel; and though no stipulated freight could be agreed, that the seamen could proceed against the goods in specie, to enforce their rights to the amount of a reasonable freight, to be determined *boni viri arbitrio*. I am ignorant that the doctrine was then considered by some of the profession as somewhat startling, for its supposed novelty and boldness. But after ample time to review and reconsider the subject, I have seen no reason to retract or qualify the doctrine of that case. It is, in my judgment, a just and logical deduction from the peculiar character given by the law to the seamen's contract; and is supported by the highest authority in the maritime law.

The owners, says Emerigon, who are shippers in their own vessel, have two qualities which ought not to be confounded. In quality of shippers, they owe a freight to the ship herself; and in their quality of owners, the ship owes a freight to them; and he adds, this freight is pledged to the crew. *Des Assurances*, ch. 17, sect. 10, No. 2. It constitutes a part of that fortune of the vessel to which the crew are to look for their pay. To them, it makes no difference who owns the cargo. So far as they are interested, there is a freight earned, and to the amount of their wages, it belongs to them.

I am aware of the dictum in the case of *Sheppard vs. Taylor*, 5 Peters' Rep. 712, that "the cargo is not in any manner hypothecated or subjected to the claim of wages." This was but a dictum, and the point was not necessarily involved in the cause. It may be true that the cargo is not directly, but it certainly is indirectly bound for the wages. For it is a first principle of the maritime law that the cargo is bound to the vessel for the freight, and another equally ancient and undoubted that the freight is pledged for the wages. Indirectly therefore to the amount of the freight due upon it the cargo is bound for the wages. The master is not obliged to deliver it until the freight is paid or secured, and if not paid he may sell so much as is necessary to pay the freight. The seamen may therefore indirectly through the master proceed against the cargo itself, for their wages to the amount of the freight due. When the owners of the ship are the owners of the cargo, the seamen's claim on the freight can be enforced in no other manner but through the merchandise; and I see no objection in principle or convenience in allowing the seamen to do that directly in their own name, which they may do indirectly through that of the master. Such was evidently the opinion of the English Court of Admiralty in the case of the *Lady Durham*, 3

Haggard 196. The Court says that "a mariner has no lien on the cargo, *as cargo*. His lien is on the ship, and on the freight as appurtenant to the ship; *and so far as the cargo is subject to freight he may attack it as a security for the freight that may be due.*" The doctrine maintained in the case of the *Spartan* seems also to have met the approbation of Judge Conkling. In his learned and valuable treatise on the *Law and Practice of the Admiralty*, p. 75-6, he says that "it is recommended by persuasive considerations of justice and supported by strong analogies in the undisputed principles of the maritime law."

It appears by the testimony of the master, who was examined as a witness in the case for the respondents that he has paid over to them at different times, \$600, and that on a cargo of lumber carried for them the freight was \$500, which has not been paid to him, but remains as part of the earnings of the vessel in their hands. In addition to this, the freight on the cargo brought home in the vessel on her return to Bath was received and collected by one of the owners and is now in their hands.

Now every dollar of this money was hypothecated to the seamen as soon as it was earned, for their wages. To the amount due to them it was their own hard earnings, and whoever received it *as freight*, received it subject to their claims. It is true that when the master pays to a creditor the money which he receives as freight the seamen cannot follow it into the hands of such creditor. For it does not pass into his hands carrying with it the quality of freight. But to the owners in this case it is paid over as part of the earnings of the vessel, that is as freight. It is said, indeed, that it is paid to them not as freight but as charter or the hire of the vessel. But even admitting under this contract of hiring on shares, that the master is to be considered as the special owner, that the general owners as to contracts made by him with the seamen as well

as for supplies are strangers to the vessel, and that these payments made to them are to be held as payments of charter, and not as payments of part of the freight, there will still remain in their hands all the freight earned on her return voyage to Bath, and \$500 which they owe on the cargo of lumber. To this amount they have the earnings of the vessel in their hands, and the seamen might in a suit against the master have attached this as freight due.

It is said, if the owners are held liable for the wages, on the ground that they have received freight, that they are liable only in the proportion that the amount which they have in their possession, bears to the whole amount earned. But if the decision were to be put on this ground alone, the consequence would not follow. The whole freight is hypothecated for the whole wages. And from the nature of the creditor's interest in the thing pledged, it is not subject to this division. Every part of the thing is pledged for every part of the debt, *propter indivisam pignoris causam*. Dig. 11, 2, 65. And therefore, if two things are pledged for one debt, and one chance to be lost or destroyed, the hypothecation or lien continues entire for the whole debt in that which remains. *Domat. Lois Civiles. Liv. 3 Tit. 1, sec. 1, No. 13. Pothier De L'Hypothèque, ch. 3, §1. Pitman vs. Hooper, 3 Sumner's Rep. 58.*

But it seems to me, that the decision may more properly be put on a broader ground. Where the owners put their vessel into the hands of a master, to be employed by him on shares, I am prepared to hold as a just deduction from the principles and general policy of the maritime law, that they will continue liable to the seamen for their wages, notwithstanding the entire control of the vessel may be surrendered to the master, unless the seamen, at the time of their engagement, are notified that the master

is to be considered as the sole owner, and that they are not to be liable. The rights of the seamen ought not to be affected by this private agreement between the master and owners. Even if the doctrine of the modern decisions is admitted, and the owners are held not liable to merchants who furnish supplies, there are strong objections to extending the principle to the contracts of seamen.— They enter into their engagements, in the confidence that they have the usual and legal securities for their wages. One of these, to which a seaman habitually looks, is the personal liability of the owners. But in this case, there will be in fact no owner, and the only personal security they have is that of the master. Another reason is, the freight which is paid to them by the master is the proper fund for the payment of the wages. In the hands of the master, the whole of it is liable for them. But here the freight is from time to time paid over for the hire of the vessel, and only one half of it remains in his hands at the close of their service to respond for their claims. This private agreement between the owners and master, operates as a perfect surprise upon them. My opinion is that they ought to be held as owners.

And further, in my judgment, they are liable for the wages as receivers of the freight. They have in their hands, according to the evidence, \$1100 of the earnings of the vessel, besides all the freight received on the cargo she brought home to Bath. The money that was paid over to them, was by the very terms of their contract, paid as the ship's earnings, that is as freight. In its quality of freight, it is liable for wages, in whosoever hands it may be. It partakes too much of the character of subtlety to call it charter, or the hire of the vessel. It is more consistent with justice, and I think quite as much so with the analogies of the law, to leave to it the name, which the parties themselves have given it, and under that name the

seamen have a right to receive their pay from it. If, indeed, the respondents were to be held liable simply as receivers of the freight, it might be necessary to amend the libel, by making the master a party, and then the services on them would operate as an attachment of the freight in their hands; and if I thought it necessary, I should not hesitate to allow an amendment to meet this posture of the case; but in my opinion it is not.

Independent of all these considerations, my opinion is, that the respondents are liable on their express promise. When the libellant presented the order of the master, a part of it was paid, and a promise given to pay the residue. The libellant had a right to consider this as a distinct admission of their liability. If this order was to be considered as a piece of commercial paper, and the principles of the commercial law to be applied to it, they would be liable upon it as acceptors. For an acceptance may be by parol or may be inferred from the conduct and acts of the party. Story, Bills of Exchange, §243. In reliance on this promise, the libellant forebore to commence proceedings against the vessel or the master. It is now too late for the owners to deny their liability.

In every point of view, I think the libellant is entitled to a decree for his wages.

Wages decreed, \$103 12.

Supreme Court of Pennsylvania.

PHILADELPHIA, JANUARY 28, 1850.

Error to Montgomery County.

JONES vs. JONES.

1. The action of the Legislature in decreeing a divorce is an exercise of Judicial power and not an act of Legislation.

2. The Constitution forbids the exercise of this power by the Legislature in cases where by law the Courts of the Commonwealth are or may hereafter be empowered to decree a divorce.

3. When a question of property requires a decision upon the constitutionality of a Legislative divorce the majestic impersonation of the sovereign people speaking through the constitution is always present in Court, and must always be heard and obeyed.

4. When a decree of divorce pronounced by the Legislature omits to specify either in the act itself or in the preamble, that the decree was granted for a cause where the Court had no power, it is error to refuse to hear evidence tending to show that the cause upon which the Legislature acted was one for which the Courts could have decreed the divorce.

The following sound and able opinion of the Court was delivered by COULTER, J.

The case presents for the judgment of the Court a question of property between two individuals. In reaching that question, however, it is absolutely necessary to consider the social relation of the parties and to estimate its effect on the question of property; one party invokes the protection of a clear and explicit provision of the constitution, and to reach *that* we must, if necessary, go over an interposing act of Assembly. In England parliament has frequently annulled the contract of marriage for adultery. There is perhaps more reason for the practice there than existed in this State for the exercise of a similar power by the legislature, because in parliament is a Court; Lord

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Coke says it is the highest and most honorable Court in the Kingdom. But that high court proceeds with the utmost circumspection, examines witnesses to prove the adultery, and in cases where the guilty parties have not left the realm, require that there shall also have been a trial in the common law courts for criminal conversation, and damages recovered; and also that a sentence of divorce in the spiritual court should have been decreed, which can only divorce *a mensa et thoro*, hence the necessity of the intervention of parliament to divorce *a vinculo* whose power only is adequate to that end. But in this State the legislature seem to have acted on the ground that it was an exercise of legislative power, and therefore not requiring a judicial examination. We think, however, that this doctrine may be well questioned. A divorce annuls a civil contract between two individuals of a higher and more imposing nature, and of more emphatic emphasis on the whole structure of society than the ordinary contracts by deed or by parol. And there flows from the severance of the contract a divestiture of property from one, and a re-investment of it in the other. It is in fact a judgment in a dispute between two individuals, the justice of which must depend upon facts in relation to which both parties ought to have an opportunity to be heard.— But however questionable the power might have been under the constitution of 1790, the amended constitution of 1838 did expressly prohibit its exercise by the legislature wherever the courts then had or should thereafter be vested with power. From which an implication results of a power to annul the marriage contract in the non-enumerated cases. The legislature has therefore a limited power, with an express prohibition outside of the limitation, sec. 14, act 1, is as follows: “The legislature shall not have power to enact laws annulling the contract of marriage in any case where by law the courts of this Com-

monwealth are or may hereafter be empowered to decree a divorce. The courts have now power to decree a divorce in almost every case where a divorce is justifiable. The act of assembly does not express on its face or in a preamble the cause of the divorce in the present case. It is in these words: "Be it enacted, &c., that the marriage contract entered into between Joseph P. Jones and Charlotte S. his wife, late Charlotte S. Styer, of the county of Montgomery, be and the same is hereby annulled and made void, and the parties released and discharged from the said contract, and from all duties and obligations arising therefrom, as fully and effectually and absolutely as if they had never been joined in marriage: Provided, the children of the said Joseph P. Jones and Charlotte S. his wife, shall enjoy all the rights and privileges of children born in lawful wedlock. Passed April 16, 1845." It does not appear from the act whether the case was within legislative power or not, and the position taken by the defendants in error, is that courts cannot go, as they called it, behind the act itself to ascertain whether it was within the pale of the constitution or not. But I apprehend that we can in all cases go to the constitution itself. The majestic impersonation of the sovereign people speaking through the constitution is always present in this court, and must always be heard and obeyed. The power confided to the legislature is a limited power, and it cannot be allowed that they should convert it into an unlimited power. If they can convert a special jurisdiction into a general jurisdiction, the provision of the constitution becomes dead. If courts cannot or will not go behind the act, where the cause is not express on its face, the clause in the constitution might as well have been that the legislature shall annul, &c., as they shall not. It requires but a trick of the pen to leave out the cause, and then the power becomes general. A great number of authorities

have been cited by the defendants in error to show that in judicial proceedings the judgment of a court of competent and general jurisdiction over the subject matter, cannot be overhauled in a collateral proceeding. All this is admitted, but then it is to be understood that the party was affected with notice, in the mode pointed out and prescribed by the law. But no court ever held that a judgment against an individual who had no notice whatever was valid; we know, that the legislature never summon the party, and that they proceed in nine cases of ten upon *ex parte* testimony. The cases therefore are not applicable. But the counsel assume the fact in contest, and then lean on these authorities. The legislature have not a general jurisdiction over the subject of divorce. Their jurisdiction is limited and these authorities, even assimilating the proceeding to analagous cases in court, do not touch the question. It was, however, ruled in *Kemp vs. Kennedy*, 1 Peters' Cir. Court Reports 36, that courts of limited jurisdiction must not only act within the scope of their authority, but that it must appear on the face of their proceedings that they did so, and if it does not so appear all their proceedings are *coram non judice*. This is the general principle as to courts of limited jurisdiction, so that every just analogy drawn from proceedings of courts is against the defendant in error. But I place the decision on the broad ground that the constitution must be preserved, and that if courts should refuse to permit evidence to show the grounds of the divorce, the legislature could obliterate the clause in the constitution. This is a question of property resulting from the divorce, the party has a right to the protection of the constitutional provisions, and if necessary the court can touch the act with the judicial wand and open it to inspection, so as to see whether or not it is within the pale of the constitution. The evil of this example would not terminate with this class of cases,

but reach with fatal effect to others. The legislature can alien and grant the public domain not already appropriated. They have, therefore, a limited jurisdiction in granting lands. Suppose they were to pass a law granting three hundred acres of land in the Delaware, by well defined boundaries to John Doe, could not the real owner of the land be permitted to show that the land had been granted more than a hundred years ago to those under whom he claimed, and that therefore the legislature had no power or jurisdiction over it. Not so if full effect is given to the argument of the counsel for defendants in error; courts cannot go behind the law but must presume against fact that the legislature acted within the scope of their power. In the one case as well as the other the legislature have a limited jurisdiction. In the case of the land to grant that which had not previously been granted, and in case of divorce to grant them where the power had not been previously granted to the courts, and the only mode of preserving the constitution and protecting the rights of individuals in either case, is to admit the best evidence, *aliunde*, as from behind the law. Evidence of this kind has been admitted by this court when the peril to individuals was not so pregnant as here. *Austin vs. Trustees*, 1 Yeates 260, *Stoddard vs. Smith*, 5 Binney 353, *Bolton vs. Johns*, 5th Barr 145. In the case of *Gaines vs. Gaines*, Penn'a. Law Journal, June 1849, the Court of Appeals of Kentucky decided that a special law granting a divorce was a judicial act, and as such belonged to the court, and admitted evidence to show that when an act was passed judicial proceedings were pending to procure a divorce, and that therefore the law was void as it respected the property of the parties, and decreed dower out of the estate of the husband, notwithstanding the legislative divorce. We are of opinion that the following evidence offered by the defendant below, ought to have

been admitted, to wit: "Defendant offers in evidence the record of an action of divorce instituted in the court of Common Pleas of Montgomery county, to August Term, 1842, No. 29, by the said Charlotte S. Jones, by her next friend David Styer, against the said Joseph P. Jones, the defendant. That the causes set out in the libel of the said plaintiff were cruel treatment, and the offering of such indignities to her person as to render her condition intolerable and life burdensome, and thereby forced her to withdraw from his habitation. That all of said causes were denied by the said defendant, and that the issue was subsequently tried and a verdict rendered for the said defendant. That on or about the sixth day of April, 1845, Mr. Sterigere, who was one of the counsel for the said Charlotte S. Jones, and at that time a Senator of Pennsylvania, presented to the said Senate the petition of the said Charlotte S. Jones, with certain affidavits or documents, praying the said legislature to pass a law divorcing her from the bonds of matrimony with her husband. That the grounds upon which the said application was made were the same as those stated in her said libel presented to this court, viz: cruel and barbarous treatment, and the offering of such indignities to her person as to render her condition intolerable. But that what follows in relation to the manner of proceeding for agencies by any member of the body ought to be rejected. It would be unbecoming and discourteous to the legislative body to admit such evidence which is excluded by the case of *Fletcher vs. Peck*, 6 Cranch 87. We are of opinion that the Court erred in excluding the evidence in the first bill of exceptions, the second, the third, and the fourth. The object on these offers was to bring before the court the highest evidence the nature of the case admitted of the grounds in which the divorce was procured, that is, the petition of Mrs. Jones to the legislature, and the affidavits by which

it was sustained, all of which it appears were in court.— The act of the legislature was constitutional, if it was passed for any of the non-enumerated causes in the constitution ; in other words, if not for any of the causes over which the court had jurisdiction. The defendant takes ground too broad, therefore, when he asks the court below to say that the act is unconstitutional on its face.— The point of this decision is that the defendant below has a right to establish, by such evidence as he offered, that the act was passed for a cause over which the courts had jurisdiction, and that the court of Montgomery county, on a fair trial between the parties in relation to the alleged causes, had given judgment against the plaintiff, and that therefore the legislature had no jurisdiction or power to grant the divorce.

A great deal was said in the argument of the duty of this court to presume that a co-ordinate branch had confined itself within the scope of its power. I will admit that if the legislature had specified in the act, or by a preamble that the decree was granted for a cause, where the court had no power, a very different case would be presented ; but they have not said it ; at most, however, this is nothing but the old argument not pushed to quite its full extent, that the court must always presume that a co-ordinate branch acted within the scope of its authority, and cannot therefore declare its acts unconstitutional. The old rule is a good one, that when a fact cannot be made to appear, the reason is the same as if it did not exist. As the legislature have not expressed the cause, we throw it open to evidence by either party, so that this question of property may be justly directed according to the constitution.

Judgment reversed and a *venire de novo* awarded.

In the 19th Judicial District of Pennsylvania.

MICHAEL WEIDMAN vs. JACOB MARSH, *et al.*

1. If the making of a will, under no pressure of necessity arising from expected dissolution, be a violation of the law of God or man, the Court will presume in the absence of proof that such circumstances of necessity existed as to justify the act.

2. A will made on Sunday, while the testator was in danger of immediate death, or entertained a well grounded belief that such danger existed, is valid.

3. What words in a will are sufficient to give a fee simple.

Messrs. Evans and Mayer for the Plaintiffs.

Mr. Campbell, for the Defendants.

Hon. ELLIS LEWIS, President of the 2d Judicial District, holding a special Court in York county, delivered the opinion of the Court:

This is a case stated in the nature of a special verdict. Two questions are presented for decision. The *first* draws into consideration the validity of the will of John Meyer, deceased, under the objection that it was made on *Sunday*; and the *second* calls upon the Court to decide whether the widow of the testator took, under the will, a life estate or a fee simple.

With regard to the *first* question: It is agreed, in the case stated that the 2d day of September, 1827, (the day of the date of the will) was Sunday. It is further agreed that the testator "did not die on Sunday." The will was proved on the 15th of June, 1829; but the precise day on which the testator died does not appear. The will has been duly admitted to probate by the proper officer of the probate court, without objection; and its validity does not appear to have been questioned until this ejectment was brought; a period of nearly twenty years. If the making of the will, under no pressure of necessity arising from

dangerous illness or other threatened dissolution, was a violation of the law of God and man, this court will certainly presume, in favor of innocence, that such circumstances of necessity existed, or *were believed to exist*, at the time the will was made, as would be sufficient to justify the act in the eye of the law. Adopting this presumption, the question remains whether the danger of immediate death, or the well grounded belief that such danger exists, is sufficient to justify the act of making a will on the Sabbath day.

Sunday is stated in all the books to be *dies non juridicus*; not made so by *statute* but by a canon of the church, *incorporated into the Common Law*. Previous to the canon of A. D. 517, the Courts, held by the ancient christians, transacted business on *Sunday*, for the purpose of distinguishing themselves from the Heathens, who were superstitious in the observance of days and times. This canon was received and adopted by the Saxon Kings of England. It was confirmed by William the Conqueror, and Henry the Second; and the courts discontinued the practice of administering justice on Sunday, holding that it was no longer a juridical day, and that a judgment rendered on that day was voidable. Thus, as Chief Justice Savage observes, the observance of Sunday became *part of the Common Law*. Story vs. Elliott, 8 Cowen 28.—Swann vs. Broome, 3 Burr 1595, 9 Co. 66. Cro. Jac. 279, 2 Bl. 526. There are numerous decisions in which it has been held, at common law, that Sunday is not to be counted as a day for the transaction of business, either in the service of notices or in rules to plead, or in the payment of notes. A note falling due on Sunday in Connecticut, must be paid on Monday, in some other States on Saturday; but in none on Sunday, where the common law prevails. So fully is this principle established as the doctrine of the common law that the courts, even after the jury are

empannelled in a *capital case*, will not continue the trial during the Sabbath day, but will adjourn. United States vs. Fries 3 Dal. 515, n.—Getter's trial. Earl's trial, Lewis' Crim. Law, 421. These decisions were not made in pursuance of any statute; for no statute extended to *judicial* acts. They were made under the doctrine that the observance of the Christian Sabbath was enjoined by the common law. Updegraff vs. Com'th, 11 S. and R. 394.

It is not to be denied that those who established the Government of Pennsylvania were *Christians*; and that they brought many of their customs from the mother country, introducing and constantly observing them, in their new home in this country. That the observance of the Sabbath was one of these customs, thus introduced and established, as part of the common law, independent of legislative enactment, is apparent from their political history. While they permitted every one to worship God, according to the dictates of his own conscience, it was well understood that this was a *privilege* conceded by a community of *Christians* to *others* entertaining opposite opinions. Those who were not Christians were protected from persecution for their religious opinions; but toleration of their errors or supposed errors, *did not go so far as to entrust them with the reins of Government*. They were not permitted to participate in the *making, expounding* or *execution* of the laws of the newly established Commonwealth. In the "Preface" to the "Frame of Government" adopted on the 25th April, 1682, the authority of the government about to be established is distinctly placed upon the law of God, as taught by "*the Apostle*" of our Saviour, "*in divers of his Epistles*." In the "Frame of Government" adopted on the 5th May, 1682, *all officers of government, from the highest to the lowest*, were required to "profess faith in Jesus Christ." 1 Colonial Records 33, sec. 24. In the "charter of Privileges," agreed to in As-

sembly on the 28th of October, 1701, while freedom of conscience was amply provided for, so that no one could be punished or persecuted for his religious opinions, care was, at the same time taken to preserve to the *Christians* the power which they had rightfully acquired in the government established by themselves. With this end in view, it was declared, in that charter, that only those who "*professed to believe in Jesus Christ, the Saviour of the world,*" were "*capable*" to serve the government "*in any capacity.*" The constitution of 1776, notwithstanding its strong guarantees of religious liberty, recognized the government as *one* founded by a *Christian people*, and required the law makers, under that government, to believe, not only in "*one God,*" and in the "*Old Testament;*" but also that "*the scriptures of the New Testament*" were "*given by Divine Inspiration.*"

It was to be expected that a government established by a *Christian community* would exhibit some traces of their observance of Sunday, as a day of rest and worship. And accordingly it was provided, in the frame of government of 25th April, 1682, sec. 22, "that as often as any day of the month mentioned in this charter shall fall upon the *first Day of the week*, commonly called *The Lord's Day*, the business appointed for that day, shall be deferred till the next day, *unless in cases of emergency.*" In the "Frame of Government" adopted on the 2d April, 1683, a section precisely similar to that of 1682 was agreed upon. In the Constitution of 1776 the observance of the Sabbath was sufficiently secured by the provision that the law makers should "*believe in the New Testament*" as "*given by Divine Inspiration.*" In the Constitution of 1790, although the qualification for office was varied, the Sabbath was not abolished. The usage to observe it had been so firmly established that no direct provision on the subject was deemed necessary. But that its constant observance as a day

of cessation from business, "unless in cases of emergency" was known and acknowledged, is apparent from the provision that Sunday shall not be regarded as one of the ten days allowed to the Governor for the consideration of bills passed by the Legislature. That this usage with regard to the Sabbath still exists, and is recognized in our fundamental law, is also apparent from the fact that the same provision, on this subject which was inserted in the Constitution of 1790, was continued in the amended Constitution of 1838, and still is in force as a part of the fundamental law. In the "Laws agreed upon in England" and adopted by our forefathers in this Province on the 5th May, 1682, the observance of the Sabbath is enjoined "*according to the good example of the primitive Christians,* and for the ease of creation" that the people may "better dispose themselves to worship God according to their understandings." The Convention, while forming the Constitution of 1776 observed, "the good example of the primitive Christians," and, without any statute, or other authority, except that example, as adopted and forming part of the common law, held no sessions on Sunday. The same practice, founded upon the same authority, has ever since prevailed with all the authorities of government, legislative, executive and judicial.

But it is part of the common law, in regard to the observance of the Sabbath, that a rigid adherence to the rule is dispensed with "in cases of emergency," or as expressed by the statute of 1794 in "works of necessity and charity." When the Provincial Conference of Committees of the Province of Pennsylvania assembled on the 18th June, 1776, for the purpose of taking measures to form an independent government, and to terminate the authority of the British Crown, in pursuance of the recommendation of the Continental Congress, the "emergency" was considered sufficient to justify a suspension of

the rigid observance of the Sabbath ; and the Report of the Committee providing for the election of Delegates to form the Constitution of 1776, and the address to the People of Pennsylvania on the subject, were presented to the conference and adopted on *Sunday*. When the Judges of the courts find it necessary to receive a verdict on Sunday, in order that the jury may be discharged, it has always been their practice to do so, and the propriety of the practice is not doubted. 15 John 119. A former Governor of Pennsylvania, whose veneration for the Sabbath and Religion will be acknowledged by all, perceiving the approach of death, believed that the public interest would be promoted by the resignation of his office ; the resignation was made and filed on Sunday, and all the necessary proceedings for supplying the vacancy were thereupon taken, without any serious question in relation to the validity of the resignation. Although we may adopt the doctrine that a *promise* of marriage made on Sunday creates no legal obligation on which an action may be maintained, yet the *actual consummation* of such *promise* by *marriage*, is universally regarded as valid, although it takes place on Sunday. Even the act of 22d April, 1794, prohibiting "all worldly employment of business whatever on the Lord's Day, commonly called Sunday," not only excepts "works of necessity and charity," in general terms, but enumerates as within the exception "the dressing of victuals in private families, bake houses, lodging houses, inns, and other houses of entertainment, for the use of sojourners, travelers or strangers, the landing of passengers by watermen, carrying travelers over the water by ferrymen, and the delivery of milk or the necessities of life," within certain hours of the day. And it has been held that *traveling* does not in a legal sense fall within the description of "worldly employment or business," although a *carrier*, driving his team, *in the exercise*

of his worldly employment, would be within the prohibition, *Jones vs. Hughes*, 5 S. and R. 302. Notwithstanding that the service of process on the first day of the week is prohibited by the act of 1705, yet the exigencies of "*treason, felony and breach of the peace*," are stated in the act itself as exceptions; and the courts have held that an arrest of the principal by the bail is also among the exceptions.

The observance of the Sabbath is a reasonable and not a superstitious usage. The acts of assembly designed to punish its violation are constitutional, because the power to pass them is clearly implied from the *character and usages* of those who formed the government. These considerations enter into the construction of a nation's fundamental laws as completely as the *custom of merchants* and the *usage of trade* govern all business transactions within their range. The general exclusion of *women and children* from office, and of persons of color from the elective franchise, under a decision, in the latter case, of the highest court in the State, in the constitution of 1790, stand upon this footing and no other. It is as well established that the people who founded the government of Pennsylvania were *Christians*, and not *Mahomedans, Jews or Infidels*, as that they were *white men* and not *Negroes or Indians*, or *women*. Resting the constitutionality of the legislation relative to the Sabbath upon this ground, it follows that the claim of unlimited power, sometimes put forth, is entirely untenable. The Legislature of "a free people"—of christian professions and habits, can neither abolish the Sabbath, nor shift it to a different day. They can neither prevent the people from observing it, nor compel them to cease from "*acquiring property*" and "*puruing their own happiness*" on the other days of the week.

The case before us does not require a decision that the

government of the *United States* has also a *Christian* foundation. The condition of that government is more *ambiguous*—it employs christian chaplains for its Army and Navy, for its Academy at West Point, and for its Congress ; while it places on record in its treaty with Tripoli, the solemn assurance that “ the government of the United States is not *in any sense* founded on the Christian Religion.” 8 U. S. Stat. at large, 155.

It is far from our intention to treat this as a theological question. It is simply a question of law, and as such to be decided upon principle and authority. No preference ought ever to be given by the State to any particular form of christian worship. The unholy connexion of Church and State meets with just condemnation throughout the land. But we must not lose sight of the fact that we and our ancestors “ time whereof the memory of man runneth not to the contrary,” have been governed by “ a rule of civil conduct” whose horn-book teachings are that ‘all human laws depend upon the law of nature and the law of revelation.’ 1 Bl. 42. If the common law should cast out Revelation, the inevitable result would be the surrender to Priestcraft and Bigotry of one of the purest fountains of jurisprudence. And the error would be more mischievous, if possible, than the excess of zeal which surrenders the Drama, one of the most powerful engines for good or for evil, almost exclusively into the hands of those who direct it to the injury of the public morals.

By preserving this fountain as one of the sources of our common law we are enabled to guard the streams from impurity, and to guide their channels in the proper direction for the public good. It is thus that the Sabbath is preserved from intolerant bigotry on the one side and from infidel desecration on the other. It is thus that its observance is secured within reasonable limits. And when we consider the numerous exceptions, already stated, from

the rule requiring its observance, it is fair to infer that the making of a will, under circumstances threatening dissolution, is among the exceptions to the rule. It is quite as necessary as many of the acts which are allowed without objection. It would be a monstrous perversion of religion, and of the law which is founded upon it, to hold that a dying man should not be permitted, for the ease of his conscience, to secure the fulfilment of those obligations of justice which may have been withheld or postponed.— So far from this being the case, the making of a will, where justice requires it, has long been regarded as a duty of religious obligation. This is evident from the rubric of the Church of England expressly directing the Priest, when he visits the sick, to “admonish the sufferer,” if he hath not before disposed of his goods, “*to make his will,*” and “to declare his debts, what he oweth and what is owing unto him, *for the better discharge of his conscience,* and the quietness of his Executors.” We have already remarked that a presumption exists that the will was made under circumstances of urgent necessity, arising from a belief in approaching dissolution. This renders it unnecessary to decide whether a will, made on Sunday *without such necessity*, is valid. It is sufficient to say that there is nothing upon this record to justify a decision against the will of John Meyer, deceased.

When it is said that the intention of the testator is to govern, it is usually added, as a proviso, “that the intention be not inconsistent with the rules of law.” But Chancellor Kent informs us that “the control which is given to the intention by the rules of law is to be understood to apply, not to the *construction of words* but to the nature of the estate—to such general regulations, in respect to the estate, as the law will not permit; as for instance to create an estate tail, to establish a perpetuity, to endow a corporation with real estate, to limit chattles as inheri-

tances, to alter the character of real estate, or to annex a condition that the devisee in fee shall not alien.' 4 Kent's Com. 535. The intention of the testator to give a fee simple to his widow violates no rule of law; and the cases which tend to defeat such intention, although not to be overruled, are certainly not to be carried farther in that direction than the precedents warrant. That those decisions have not been received with approbation is manifest from the legislation on the subject in New York, Pennsylvania, New Jersey, Virginia, Maryland, Vermont, Kentucky, South Carolina, North Carolina, Tennessee, and other States. But the will under consideration, having been made before the act of 1833, must be governed by the rules of construction in force prior to the enactment of that law.

The introductory clause is as follows: "As to such wordly estate wherewith it has pleased God to bless me in this life, I give and dispose of the same in the following manner, to wit:" He then directs his debts and funeral expenses to be paid; and then proceeds as follows: "Then it is my will and I give, devise and bequeath unto my beloved wife Elizabeth, eighty-five acres and allowance of land of my dwelling plantation whereon I now live, situate in Spring Garden township, in the county aforesaid, she to have the choice of the same wherever she thinks proper; and further, I give and bequeath unto my said wife all my moveable property or personal estate, of what kind or nature the same may be, together with all the monies due me by bond, note or book account, to and for her only proper use and behoof whatever. Then it is further my will that my brothers and sisters divide the *residue of my plantation* amongst themselves share and share alike."

The words of the introductory clause are said by Chief Justice Marshall to be "entitled to considerable influence

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in a question of doubtful intent." *Finlay vs. King* 3 Pet. U. S. Rep. 379. In this case, their connexion with the devising clause and the express direction that he devises, "*in the following manner,*" "*such wordly estate as it has pleased God to bless him with*" indicates an intent to pass a fee, and also indicates an intention not to die intestate as to any part of his estate. The words "to and for her only proper use and behoof whatever" occurring at the close of the "item" which contains the devise and bequest of real and personal estate to the widow may be understood as applicable to both; and wherever real and personal estate are given by the same words, it shows an intent to give the same interest in both—that is an absolute interest in both. 6 Bin. 98. This is a mixed devise of real and personal estate, a matter said to be "by no means unimportant in ascertaining the testator's intention," 14 S. & R. 101, 1 Wils. 333, 1 Munf. 549, 10 Barr 249. He directs the residue of his plantation to be divided amongst his brothers and sisters. A construction which would confine the widow to a life estate, would give the brothers and sisters a life estate also in the residue, and the result would be that the testator, although he announced his full purpose to devise, *in the manner stated*, "*such wordly estate*" as he possessed, in reality died intestate of the greater, part of his estate. Taking all these considerations together it is the opinion of the Court that Elizabeth Meyer, the testator's widow, took a fee simple under the will.

It is therefore ordered that judgment be entered for the defendants for costs.

Legislative Divorces.

The Hon. JAMES M. PORTER, Chairman of the Judiciary Committee, has recently made a report to the House of Representatives in opposition to the course of practice which has prevailed in the Legislature of Pennsylvania for some years past on the subject of granting divorces. The Report is sound and judicious in its general principles, and the rules recommended for adoption are called for by the highest considerations of justice and policy.

It would be very difficult to show to a sound legal understanding the source from which the *legislative power* of Pennsylvania, previous to the amended constitution of 1838, derived the power of granting divorces. To make a *decree* dissolving the most solemn and the most binding contract which can be made, is an exercise of *Judicial power* and not an exercise of the *Legislative power*. To call such an *act* a *law* instead of a *judicial decree* is a dangerous misnomer. The practice had been so inveterate that the Convention of 1838 (of which body Judge Porter was a distinguished member) stripped the Legislature of all concurrent jurisdiction with the Judiciary by declaring that "the Legislature shall not have power to enact laws annulling the contract of marriage, in any case where by law the Courts of the Commonwealth are, or may hereafter be empowered to decree a divorce."

This provision seems to be a recognition of the Legislative power over divorces in cases where the Courts have not jurisdiction. It is monstrous to construe this *restraining* provision as *enlarging* the authority of the Legislature. But this seems to have been the practical construction. Wherever the causes of divorce exist which entitle the party aggrieved to a divorce in Court, upon due notice to the adverse party and full proof of the facts, the Legislature cannot act in the matter; but where there is no cause whatever—or no good cause such as is recognized by the general law—or where there is no evidence to support the application, or where the parties have no domicile in the State, and neither Courts nor Legislature have any jurisdiction over them, then the Legislative power is invoked; and it is painful to perceive how much time is wasted in passing on these applications and how often they are decided without any regular provision for notifying and hearing the party whose highest and dearest rights are affected by the decree, and without any legitimate proof in support of the application.

Since writing the foregoing we have received a highly important opin-

ion of the Supreme Court of Pennsylvania, delivered by Mr. Justice COULTER. The opinion appears in this No. and will be received with approbation throughout the Union.

The decision of the Kentucky Court of Appeals, as delivered by Chief Justice MARSHALL, in February, 1848, 1 *Am. Law Jour.* 555, 9th *Ben. Monroe's Reports* 300, proceeds upon principles similar to those maintained by Mr. Justice COULTER. We infer that when any of these divorces shall be brought before the court, upon the question of *domicil*, a proper regard will be evinced for the principles of comity, and for the rights which belong to the sovereign States of the Union. The mischief arising from an honest exposition of the law will fall mainly on those who have improperly countenanced an appeal to a tribunal having no jurisdiction and proceeding without notice and chiefly without competent evidence. The wholesome results in arresting immorality, in sustaining constitutional rights, and in lessening the great evils and expenses of special legislation, will be incalculable.

[ED. AM. LAW JOUR.]

The following is an extract from the Report of Judge Porter :

The committee to whom was referred the memorial of Charles J. Sykes, of Syracuse, in the State of New York, on the subject of the passage of an act divorcing his wife from him, report :

It appears, in the present case, that the parties never were domiciled in Pennsylvania. They were married on the 3d day of July, 1848, in the State of New York, of which, it is presumed, they were both residents and inhabitants. Such appears to be the admission of both the parties on the papers presented to the last and present Legislature. Sometime subsequent to the marriage, the parties, with the father and mother of the wife, were traveling through Pennsylvania, giving exhibitions on the subject of animal magnetism, mesmerism, &c. ; and the wife and her mother averred that, both in New York and Pennsylvania, he maltreated his wife, and beat and abused her ; which allegations the husband denies. The only evidence which appears to have been produced to the Legislature, upon the subject of this alleged ill-treatment, is the *ex parte* affidavit of the mother of the wife, made before a Justice of the Peace in Harrisburg, on the 9th

day of April last—a portion of which consists of hearsay, being the declarations of the wife to her mother in the husband's absence.

The committee do not find in the evidence any sufficient cause for divorcing the parties from the bonds of matrimony, were the matter before a tribunal having proper cognizance of such matters. But when we look at the consequences involved in the course of legislation, which has been pursued for some years past, on the subject of divorces—of which the present case is an apt illustration—they cannot help calling the attention of this House to the subject, in terms of deep reprobation.

The evils of Legislative interference and enactments, in cases of divorce, had attained such a pitch, that the framers of the present Constitution of the Commonwealth deemed it necessary to place a wholesome restraint upon the Legislature in relation to it, as follows: Article 1, Sec. 14.)

“The Legislature shall not have power to enact laws annulling the contract of marriage, in any case where by law the courts of the Commonwealth are, or may hereafter be empowered to decree a divorce.”

A reference to the debates in that body, in relation to this subject, will shew a number of cases brought to view, in which the power of the Legislature to grant divorces had been inconsiderately and improperly, and, in some instances, cruelly exercised.

When the framers of the Constitution imposed this restraint, they did not mean to encourage the Legislature to pass upon cases, where light and frivolous reasons, such as would be insufficient in law to authorize the courts to grant divorces, were laid before them. They meant to discourage the granting of divorces in all cases, but where sound reason and policy dictated the necessity of dissolving the marriage contract, in cases where existing laws

did not afford the necessary redress. The object of the constitutional provision was merely to leave open the door for legislative action in clear and flagrant cases.—Such cases might well arise, where the parties had their domicil in the Commonwealth, but had not yet been admitted citizens of the United States and of this State, and also under other circumstances. It never was intended that the Legislature should assume the arbitrary power of granting a divorce without sufficient cause, or of dissolving a marriage contract entered into in another State, and in which State the parties still remained domiciled. The attempt to exercise such a power would be purely nugatory, and would not answer the purpose intended.—Our existing act in relation to divorces, confers upon the Courts of Common Pleas the right to grant divorces in cases of impotency, bigamy, adultery, wilful and malicious desertion without reasonable cause, persisted in for the space of two years, or where the husband shall have, by cruel and barbarous treatment, endangered his wife's life, or offered such indignities to her person as to make her condition intolerable and life burdensome, and thereby force her to withdraw from his house and family. But it restricts the power to cases of *citizens* of the State, who had resided therein one whole year before the application, which was subsequently explained, in the case of the wife, to be one “who shall have had a bona fide residence in the State for one whole year previous to filing her petition or libel.”

In the present case, if the husband had maltreated his wife, offering such indignities to her person as to render her condition intolerable and life burdensome, then, if their domicil had been in the State of Pennsylvania, and they had resided here a sufficient length of time, the courts of Pennsylvania would have had the right to grant relief to the injured party. But if the marriage were con-

tracted in New York, and the parties had not acquired a domicile in Pennsylvania, then neither this Legislature, nor any court in Pennsylvania, would have had any jurisdiction of the matter, and the parties ought to be referred to the tribunals of the State to which they belong, for redress.

This subject has been before the Supreme Court of Pennsylvania. In *Dorsey vs. Dorsey*, 7 Watts 353, where the parties were married in Pennsylvania, removed to Ohio, resided there together until they obtained a domicile; then desertion took place, in Ohio, and the injured party returned to Pennsylvania, and after the lapse of two years and upwards, applied to our courts for a divorce; it was refused, the court holding "that the law of *the domicile*, at the time and place of the injury, was the rule for every thing but the original obligation of marriage." The wife could not, at law, acquire a separate domicile from her husband.

The rule as to domicile and jurisdiction is the same, whether the Legislature or the Court is called upon to annul a marriage contract. Each acts in the matter judicially, and no body acting judicially, can exercise a power which the law, organic or otherwise, does not confer. What power has any tribunal in Pennsylvania to assume jurisdiction over citizens of another State, who have no domicile here, and annul contracts of marriage between them? What would be the effect of such an attempt upon the parties themselves? Would it absolve the party at whose instance it was procured, from the penalties for bigamy, in case of marrying again? Would the courts of any other State pay any respect to such an enactment? It is believed that there can be but one answer given to these questions, and that is, it would not dissolve the marriage contract nor absolve the party from its obligations and duties, nor from the penalties imposed by law for their violation.

The better opinion seems to be, too, that even in our own State it could have no greater effect. The power of the Legislature in relation to divorces, is a limited, not a general one. It can only be exercised in the cases authorized. It would, therefore, follow, that in all acts dissolving marriage contracts, the facts necessary to give jurisdiction should exist; and it would be highly proper that they should appear in the act itself. If they do not exist, the courts would have power to go behind the formal enactment of the law, and ascertain if it is not a case prohibited by the Constitution.

The Executive is a constituent part of the Legislature. When he approves a bill, *he acts*; so too, when he disapproves it. He may, it is true, treat it *passively*, and let it become a law, as has been done by the Executive in very many instances, since the adoption of the Constitution of 1838, because he could not tell, from the face of the bill itself, whether it was a case within the constitutional provision or not: or he may call for the documents on which the legislative action has been predicated, and thus exercise his discretion whether to approve and sign the bill, or disapprove it, and return it with his objections to the house in which it originated. But this course is an inconvenient one, and imposes upon the Executive the labor of examining all the testimony, a burden to which he ought not to be subjected, if it could be avoided.

Most if not all the divorces granted by the Legislature are without notice to the opposite party; and most, if not all such cases, are supported by *ex parte* affidavits, which do not place before the Legislature the facts of the cases as they really exist, or as they would appear if the opposite party had an opportunity to cross-examine the witnesses, or make his counter statement. Proceedings before the Legislature should not be sustained with less regard to notice and hearing the parties, than in a court of justice.

An inattention to the principles herein laid down, has subjected the Legislature of Pennsylvania to the annoyance of listening to applications for divorces by citizens of other States, where a stricter rule is observed, by which the time which should be devoted to the business of the citizens of our own State, has been consumed. The members have been subjected to the personal importunities, persuasions, &c., of the applicants, and the result has been the passage of numerous acts, granting divorces in cases where the jurisdiction did not belong to Pennsylvania, or where the facts would not justify them.

The committee deem it important that some general rules should be adopted in relation to this subject, by both branches of the Legislature, to form part of the standing rules ; such as

1. That no petition for divorce shall be received by either branch of the Legislature, without at least thirty days' previous notice of such intended application having been given to the opposite party, the proof of the service of which notice shall accompany such petition.

2. That no petition for divorce shall be received except where the domicile of the party is within the State of Pennsylvania, and the alleged causes of divorce set forth in such petition, and verified by affidavit.

3. That at least ten days' notice shall be given to the opposite party of the taking of any depositions in support of such application, otherwise they shall not be received as documents in support thereof.

4. The causes for which the divorce is granted, shall always be embodied in the act granting the same.

In the District Court for the City and County of Phil'a.

DECEMBER 22, 1849.

FREEMAN vs. GILPIN.

1. Notwithstanding the decision in *Hurley vs. Lybrand*, 2 Whart. Dig. p. 252 pl. 10, under the act of 1806, a paper hanger is under the act of 1836 entitled to a lien for work done and materials furnished in the construction of a building.

2. The act of 24th March, 1849, giving a lien specifically to *paper hangers* is not a conclusive construction that it did not before exist under the act of 1836.

STROUD, J. The exception to the Auditor's Report raises a single question: whether a *paper hanger* can claim a lien for work and materials to a new building.

It was decided under the mechanic's lien act of 17th March, 1806, that that act admitted of no such claim.—*Hurley vs. Lybrand* 2 Whart. Dig. pl. 10 p. 252. The grounds of this opinion have not been transmitted. They are supposed to have been derived from the fact that there is in the enacting clause of the act an enumeration of certain mechanics and material men, such as brick makers, bricklayers, stone cutters, masons, lime merchants, carpenters, painters and glaziers, iron mongers, blacksmiths, plasterers and lumber merchants, who for the work done or the materials furnished by them, are declared to be entitled to liens, whilst no mention is made of a *paper hanger*. This argument is entitled to much consideration. For though this enumeration is followed by more general language, "or any other person or persons employed in *furnishing materials* for or in the construction of such house," &c., yet it is observable that this language does not extend to *work* done, but is restricted to the furnishing of *materials* by such other persons. *Paper hangers*, therefore, not being in the enumerated class of protected

mechanics, and the other language not comprehending claims for *work done*, would seem not to have been within the purview of the act of 1806.

But the act of 16th June, 1836, is couched in very different language. It reads thus: "Every building erected &c., shall be subject to a lien for the payment of all debts contracted for work done or materials furnished for or about the erection or construction of the same."

Here is no enumeration, but the expressions are as general as possible. And as there can be no doubt at the present day, whatever may have been the practice formerly, that a *paper hanger* does work and furnishes materials in the construction of a house, there seems no just ground for his exclusion from the benefits of this act. New houses are seldom offered for sale or to be let until *papered*.—When the act of 1806 was penned and for many years afterwards, the practice was otherwise. This change of circumstances in itself requires a corresponding application of the law.

The exception filed exhibits an argument in contravention of the view just taken, which deserves to be distinctly noticed; on the 24th of March, 1849, since the claim under examination was filed, an act of Assembly has been passed as a supplement to the Act of 16th June, 1836, which gives specifically a lien to *paper hangers*. (See Brightley's supplement to Purd. Dig. p. 174.)

This enactment is certainly based upon the supposition that the prior law was defective in this particular, and from this it is argued that such should be deemed to have been its proper construction.

But in *Pennock vs. Hoover*, 5 Rawle 291, it was decided that an assessment for *paving* by the Commissioners of Kensington District created a lien under the act of 3rd February, 1824, relating to taxes on real estate in the city and county of Philadelphia, which related to the *date of*

that act in regard to *priority* over other incumbrances, notwithstanding a special act was passed on the 20th of March, 1830, which gave a lien for similar work, to take precedence merely of *subsequent* liens. The effect of such contracted legislation was brought prominently to the view of the Court and was deliberately passed upon.

If therefore the act of 1836, by a fair interpretation can be held to embrace *paper hangers*, the enactment recently made on the supposition that it did not, ought not to prejudice the claim in question. It was allowed by the Auditor and we think rightly.

Exception dismissed.

New Publications.

A TREATISE ON THE LAW OF EVIDENCE, 6th American, from the 9th London Edition, with considerable alterations and additions. By S. Marsh Phillips, Esq., Barrister at Law, in 3 volumes. With notes to the 1st and 2d volumes by Esak Cowen, late one of the Judges of the Supreme Court of the State of New York, assisted by Nicholas Hill, Jr., the notes to the 3d volume by a Counsellor at Law. With additional notes and references to the English and American cases, to the present time, by J. Marsden Van Cott, Counsellor at Law. Published by Banks, Gould & Co., 144 Nassau street, New York; and by Gould, Banks & Gould, 104 State street, Albany. In 5 volumes. 1850.

This work has just made its appearance. The style in which the 5 large octavo volumes have been got up is deserving of high praise; but this is a small matter compared with the great labor and judgment bestowed by the author and the various editors in preparing the work for the press. We remember when, in 1816, George F. Hopkins, a printer, who then kept his office in William street, New York, printed what we presume was the first American edition of this work. It was then but a single volume. Small as the work was, it was very highly esteemed.—The able and industrious author has kept pace with the march of improvement, and has, from time to time, remodeled and enriched his work. It has passed through *nine* editions in England, and *six* in this country, and the text now composes three volumes, while the whole work, including the notes, consists of five large octavo volumes. The notes to the 1st and 2d volumes, by Judge Cowen and Mr. Hill, compose two volumes

containing over 1600 pages. These notes differ so widely from the catch-penny "notes of American decisions" so often got up to impose upon the profession the mere re-prints of English works, that we have no hesitation in recommending them as *fully equal in value to the work itself*. The references to the English and American decisions, *to the present time*, will be duly appreciated. The notes to the whole 3 volumes, exclusive of the notes and references at the bottom of each page of the text, occupy *nearly 2000 pages of small type*!

We are far from recommending a reliance upon *Abridgements*, however carefully prepared. They should only be used as *tables*—as a means of ready reference to "the books at large." But, from the brief opportunity we have had of examining the work before us, we are free to say that **IT POSSESSES A GREATER VALUE TO THE AMERICAN PRACTITIONER THAN ANY OTHER WORK ON EVIDENCE EVER PUBLISHED IN THIS COUNTRY.**

Sandford's Chancery Reports.—The 4th volume of these Reports has just been published by Gould, Banks & Co., of New York. By the constitution adopted in Nov. 1846, the New York Court of Chancery ceased to exist from and after the first July, 1847, except that the Chancellor was continued in office for a year to dispose of causes ready for a hearing.—The unfinished business was transferred by the constitution to the Supreme Court thereby organized.

Vice Chancellor Sandford was elected a Justice of the Supreme Court on the 7th June, 1847. The present volume contains the decisions of the Vice Chancellor up to the close of his labors in that office. We shall notice the volume more at length hereafter.

Barbour's Reports.—The 4th volume of these Reports of the decisions of the Supreme Court of New York has just been published by Gould, Banks, & Co. We have no room, in the present number, for an extended notice of the contents of the work. But the friends of an elective Judiciary will be greatly encouraged by the fearless manner in which the new Judges, deriving their authority from the people, deal with legislative attempts to destroy vested rights. The case of *The People vs. Supervisors of Westchester* is an instance. It is gratifying also to perceive that the law of waste is laid down in conformity to the demands of our newly settled country. The settler upon uncultivated lands, under a claim of title in fee simple, is not to be arrested in the progress of clearing and cultivating the land, in accordance with the course of good husbandry, by an

Ejectment, and a writ of Estrepement, unless he does something to the lasting injury of the inheritance. See *The People vs. Daveson*, p. 110.

Denio's Reports.—The 5th volume of these Reports is before us. It is handsomely printed by our old friend G. M. Davidson, of Saratoga Springs, and is elegantly bound in calf. It is published by the old and well established houses of Gould, Banks & Gould, Albany, and Banks, Gould, & Co., New York. 1850. It contains the cases argued and determined in the late Supreme Court, and in the late court for the Correction of Errors of the State of New York. It is the final record of the Judicial determinations made by the old courts before they were abolished by the recent change of the constitution of that State; and is the last of a series of more than *seventy* volumes, embracing a period of nearly as many years, containing the labors of the eminent Judges who administered justice under the ancient forms of practice. The volume is appropriately dedicated "*to the surviving Justices of the late Supreme Court of Judicature,*" and comes to us *packed carefully in blank declarations and judgment records in use under the old system of practice.* The volume itself would seem to partake of the spirit and dignity of those whose decisions it contains. It wraps itself up in its ancient mantle and expires at the feet of those who stand as monuments of the past! Cæsar himself, as muffled in his mantle, he fell at the base of Pompey's statue, did not expire with more dignity.

But the decisions of the Judges under the old system will still be consulted with advantage. Those who are charged with the duty of "re-arranging and re-naming the dislocated fragments of the law of that State" will find that "the judgments contained in the series of reports of which this is the final volume will afford the principal landmarks."

Monroe's Reports.—We have just received in sheets, fresh from the Press, the 9th volume of Benj. Monroe's Reports of cases at common law and in Equity decided in the court of Appeals of Kentucky. This volume contains the cases decided at the winter term, 1848, and summer term, 1849. It is printed at Frankfort, Ky., for the Reporter, at his printing office. There is a freshness and vigor, and an adaptation to the exigencies of a new country, in the decisions of the Western Courts, which elevate them far above the sickly, namby-pambyism of worn out minds, ever dealing in, and misunderstanding, and misapplying, obsolete technicalities. We shall take a peculiar pleasure in examining the vol-

come before us at our leisure, and shall notice its contents more particularly, after we shall have completed its perusal.

CASES IN THE CIRCUIT COURT of the United States for the Third Circuit with an Appendix. Reported by John William Wallace. Philadelphia: Walker, 24 Arch street. 1849.

We were pleased to find a few days ago Mr. Wallace's first volume of Reports on our table. Some time since (vide 1 Amer. Law Jour. 332) we were furnished with an elegant pamphlet embracing the celebrated Pea Patch case, and we now have a completed volume commencing with the April Sessions, 1842, and ending with the October Sessions, 1849.—The reporter in his preface gives us the causes of the long delay which has intervened between his first and last case, almost the nine years of Horace. He tells us "when the present volume was undertaken at the request of the late Mr. Justice Baldwin, and partly printed, near eight years since, it was supposed that in the course of a short time a sufficient number of cases would be decided, in different parts of the Circuit, to complete the book. But the illness of that Judge, his subsequent removal and residence in one of the most remote counties of the Circuit, and, after his death, a vacancy on the Bench for between two and three years, during which the Circuit was without a presiding Judge at all, disappointed these expectations. And when the present Judges took their places on the bench, the business of the Court had so largely departed from it, so much of what remained was fallen into decay, and indeed, the Court itself had become so unfamiliar to the bar, that notwithstanding the well known character of the new Judges, and their readiness to attend to the business of the Circuit, it was impossible for some time, to bring anything to a condition in which it could be either heard or disposed of. A jurisdiction entirely new would have had less to contend with in this respect, than one thus fallen into desuetude. It is only now, indeed, that the confidence which the new Court so justly inspired, begins to shew itself in the increase of its business and the revival of its ancient importance." We fully agree with the reporter as to the confidence inspired by the new Court.

This volume owes much of its value to the industry and learning of the Reporter. The points reported are chiefly novel and always important. The references are all carefully noted in the margin, and neatly printed there, with a running commentary of the contents of the volume properly prepared to facilitate reference. The statements of the cases are prepared with care; the points are carefully considered and remarkably succinct and exact; the citations have been verified and may be relied on as in point; and the Reporter has spared neither pains, labor nor expense to give the profession a truly useful book; and in our humble judgment

he has been eminently successful. We had noted several cases of deep professional interest upon which we intended to comment, but an already extended notice forbids. We cannot refrain, however, after a careful reading of the entire volume, from commending it most heartily to all our professional brethren, both at home and abroad, as a volume which will (a rare thing certainly in law books) at once gratify the taste of the fastidious scholar, and instruct and enlighten the dryest, hard working, practical every day legal laborer.

A TREATISE ON WILLS, by Thomas Jarman, Esq., of the Middle Temple, Barrister at Law. In two volumes. Second American Edition, with large additions to the text and notes, and references to American Decisions. By J. C. Perkins, Esq. Boston: Charles C. Little & James Brown. MDCCCXLIX.

Every professional man feels daily the great necessity of works on Wills; treatises which discuss their execution and construction. Few questions more perplex or embarrass the lawyer, or are more frequent subjects of discussion and adjudication. In 1845 Judge Perkins edited and annotated Mr. Jarman's popular and learned Treatise, suiting it to the wants of the American profession; the manner in which this was done, the ease and thoroughness of his editorial labors, commended the American edition to the profession. Mr. Jarman's work has enjoyed and still retains a high reputation in Westminster Hall. It fills up a space in the legal library which has been heretofore unoccupied, or only partially filled by Mr. Jarman's own notes to Powell on Devises. Lincoln's Inn probably does not contain a more competent writer or annotator, on the perplexed subjects of Testamentary Law, than the erudite author of this work; he has been constantly engaged in cases involving the very learning here set forth, and his industry and ability have presented large accessions to the arguments, opinions and adjudications on testamentary subjects.

The book has been especially fortunate in its American Editor. He combines the same learning and diligence in his cis-Atlantic researches and notes which have given to Mr. Jarman's own labors such universal professional commendation. This second American edition is certainly much superior to its predecessor; the editor having added to the original text, chapters on the very important subjects of the Probate of Wills, on the personal ability and capacity of testators, and on the evidence in testamentary cases. The law on those complicated and extended subjects, has been collected, investigated and arranged with unusual ability, clearness and accuracy, thus adding great interest and value to this edition, and in fact making almost a treatise *de novo* of considerable bulk, elaborate preparation and great practical value.

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The Slavery Question,

OR THE RIGHTS AND THE UNION OF THE STATES.

If ever this powerful and glorious Union should be broken up, the fragments, as they lay scattered around, a powerless prey to the Monarchists of Europe, may seek for the chief cause of the disaster in the frequent claims, by the Federal authorities, of powers either not granted by the National Constitution, or of a character so doubtful as to forbid their exercise. The tendency of power is to forget right, and to disregard every limitation intended to operate as a restraint. The frequency with which usurpations have been successful, in the histories of Nations, emboldens those clothed with "a brief authority" to be regardless of the limits prescribed. But it should be remembered that the cases of successful disregard of constitutional limits are generally those of infringements upon the rights of *individuals*—of impositions by the *strong* upon the *weak*. But usurpations by the federal authorities, upon the rights of thirty independent and sovereign States must ever meet with a different result. Where the rights of sovereignty of so many free and powerful

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commonwealths are involved, every exercise of the federal power will be examined with scrutiny; and, if not warranted by the grant, resisted with an energy and an influence which no single individual can ever exert.

It should never be forgotten that the Federal Government, although Supreme within its appropriate limits, is nevertheless not a government of *general*, but of *limited*—of *enumerated* powers. For every exercise of authority it must show an express grant, or that the power was so necessary to that expressly granted as to be plainly implied. The claim of a doubtful authority is fraught with danger to the public peace, and the wilful exercise of a power not granted is an act little short of treason to the Union itself.

The peculiar institutions of the South, and the incessant hostility to them, manifested in the North, present frequent occasions for examining the distribution of power under our confederated system. These questions are of a nature so delicate as to require the utmost prudence and forbearance in their decision. Many of them are purely political, and these are attended with the greatest danger to the Union, arising from the want of a common Umpire to which the contending parties can appeal with confidence. Others are of a character which admit of solution in the Judicial tribunals; and it is natural that the Nation should expect much from the Supreme Court of the United States, in the exercise of its authority over these questions. Considering the magnitude of the interests which are occasionally brought under discussion before it, and the great dignity of the sovereign parties whose rights are thus involved, there is an obvious propriety in the observance, by that Court, of the greatest possible respect for the parties, and of the greatest possible delicacy in its course of proceeding. On no occasion, should a question of sovereignty be *unnecessarily* discussed and decided by that Court; and under no circumstances should it sustain the federal government against the governments of the States in an attempt to grasp either a *doubtful power* or a *power not granted by the States*. Its usefulness must depend upon the confidence which the people may have in its attachment to the true principles of our system of government. If at any time it should aid either the Legislative or the Executive departments of the Federal Government in an attempt to change the character of the government from one of *limited* to one of *general* powers—if it should be forgetful of the rights of sovereignty which still reside in the States, and render itself an instrument of usurpation in the hands of the great central power, its influence would soon be gone; and, great and powerful as the Court may be, its arm would instantly be paralyzed. The Judges who should become thus recreant in official duty would be brought to tremble before the as-

sembled sovereignties whose rights they had attempted to trample under foot. The Judge who is false to the rights of the States is false to the Union; and a perverse persistence in an error affecting the happiness of the people, the peace of the country, and the stability of the government itself, deserves the severest censure. It is a great mistake to suppose that the people of this great nation of freemen are destitute of the means of vindicating their rights. A faithless, or an incompetent member of the Legislative department is dismissed by the people. A similar fate awaits a faithless Judge at the hands of the people's representatives. Unfaithful and ignorant stewards may be degraded and dismissed, but the Union shall live forever in the affections of a people enlightened enough to understand their rights and brave enough to defend them.

Without intending to charge upon any of the Judges of that Court a want of fidelity to their high trust, justice and patriotism alike require that their errors should be held up to public reprobation. Where a Judge of the Supreme Court of the United States, either from an erroneous conception of the nature of the government, or from a careless indifference to the rights of the States, or from a truculent cringing at the foot-stool of the Central Power, promulgates from his high station, uncalled for by the case before him, doctrines at war with the rights of the States, and with the safety of the Union, he fixes a stain upon his judicial reputation which should be held up to view as a warning to those who may come after him. His public acts are public property; and, living or dead, he must expect, in this nation of free investigation, that the eye of scrutiny shall be upon him—that the voice of truth shall proclaim his errors, and that the hand of justice shall write, in imperishable letters upon the wall, the withering sentence of "MENE, MENE, TEKEL, UPHARSIN."

No decision of the Supreme Court of the Union has produced more evil consequences than that pronounced in the case of *Prigg vs. Pennsylvania*, reported in 16 Peters 539. It has embarrassed the owners of slaves in recovering their property in the free States. It has encouraged the abolitionists in their efforts to increase those embarrassments. It has offended the dignity and trampled upon the sovereign powers of every State in the confederacy. It has impaired public confidence in the tribunal which could give currency to such dangerous heresies, in a case of great simplicity, *not in the slightest degree involving the important doctrines so gratuitously drawn in question.* And finally, it has endangered the peace and happiness of that great Union of independent States which is the Home of Freedom on this Continent and the Beacon Light for all the other Nations of the Earth.

In the *Pennsylvania Law Journal*, vol. 7, p. 254, the doctrine of Justices Story and Wayne, in *Prigg vs. Penn'a.*, is spoken of as "startling" and

"generally denied." Mr. Clay in his recent speech in support of resolutions offered by him in the United States Senate, for the purpose of adjusting by compromise the difficulties which have arisen out of the slave question, thus refers to this unfortunate decision :—

"There has been some confusion, and I think misconception, upon the subject, in consequence of a recent decision of the Supreme Court of the United States. I think that decision has been entirely misapprehended. There is a vast difference between imposing impediments, and affording facilities in the way of recovering the fugitive slave. The Supreme Court of the United States have only decided that the laws of impediments are unconstitutional. I know, sir, there are some general expressions in the opinions to which I have referred—the case of Maryland and Pennsylvania—that would seem to import otherwise ; but I think that when you come to attentively read the whole opinions pronounced by the Judges, and take the trouble that I have taken to converse with the Judges themselves, you will find that the whole extent of the principle which they intended to adopt was, that any laws of impediment enacted by the States were laws forbidden by the provision of the Constitution to which I have referred, and that the General Government had no right to impose obligations upon the State officers that were not imposed by the authority of their own constitutional laws. Why, it is impossible ! If the decision had been otherwise, it would have been extra judicial. The court had no right to decide whether the laws of facility were or were not unconstitutional. The only question before the court was upon the laws of impediment passed by the Legislature of Pennsylvania. If they have gone beyond the case before them to decide upon a case not before them, the decision is what lawyers call "*obiter dictum*," and is not binding upon that court itself, or upon any other tribunal. I say it is utterly impossible for that court with the case before them of the passage of a law by a State Legislature, affording aid and assistance to the owner of the slave to get back his property again ; it is utterly impossible that that or any other tribunal should pronounce the decision that such aid and assistance rendered by the authorities of the State under this provision of the Constitution of the United States was unconstitutional and void. The court has not said so ; and even if they had said so, they would have transcended their authority, and gone beyond the case which was before them.

The laws passed by States in order to assist the General Government, so far from being laws repugnant to the Constitution, are rather to be regarded as laws carrying out, enforcing, and fulfilling the constitutional duties which are created by that instrument. Why, sir, as well might it be contended that if Congress were to declare war—and no one will doubt that the power to declare war is vested exclusively in Congress, and that no State has a right to do it—no one will contend that after the declaration of war, it would be unconstitutional on the part of any State to lend its aid and assistance for the vigorous and effectual prosecution of that war. And yet it would be just as unconstitutional to lend their aid to a successful and glorious termination of that war in which we might be engaged, as it would be unconstitutional for them to assist in the performance of a high duty, which presents itself to all the States and to all the people in all the States. Then, Mr. President, I think that the whole class of legislation, beginning in the northern States, and extending to some of the western States, by which obstructions and impediments have been thrown in the way of recovery of fugitive slaves, are unconstitution-

al, and have originated in a spirit which I trust will correct itself when these States come to consider calmly upon the nature of their duty."

Mr. Clay is undoubtedly correct in declaring the decision, as generally understood, erroneous, and in maintaining the true doctrine that "laws passed by the States, in order to assist the General Government, so far from being laws repugnant to the Constitution, are rather to be regarded as laws carrying out, enforcing and fulfilling the Constitutional duties which are created by that instrument." He is also right in declaring that "the Court had no right" (in the case before it where the question did not arise) to decide whether the laws of facility were or were not unconstitutional, and that such decision, if made by the Court, *"could have been extra judicial."* It has ever been so regarded in the Lancaster District of Pennsylvania, where, notwithstanding the decision in *Prigg vs. Penn'a.*, so much of the Pennsylvania statute of 1826 *as was not in conflict with the rights of the slave-holder under the Constitution and laws of the Union*, has been constantly enforced until its repeal. The authority of the decision has been confined, as it should be, *to the question upon the record*—to wit—whether a State could constitutionally pass a law to convert the act of recaption of *property*, by the owner or his agent, into the crime of kidnapping. But we think Mr. Clay is in error in saying that "the Supreme Court of the United States have only decided that the laws of impediments are unconstitutional." It is evident that the distinguished Senator, in forming this opinion, has not confined himself to the report of the case. He informs us that he has *"taken the trouble to converse with the Judges themselves;"* and it is with great satisfaction that we infer that the error will not be persisted in. This is certainly something gained to the cause of freedom and State rights.—But let us see how stands the record. Let the errors be pointed out, and let the authors receive their just meed of censure. Let those who faithfully stood by the Constitution be also known that they may receive the plaudits of a grateful people.

A brief history of the case is necessary to a proper understanding of the subject. In 1826, at the instance of a Committee from the State of Maryland, an act was passed by the Legislature of Pennsylvania offering facilities for the arrest and surrender of fugitive slaves to their owners, upon proof of ownership, and giving to the owner, on his application to the State authorities, the aid of the process and the services of the officers of the State, in effecting such arrest and surrender. At the same time a section was inserted providing substantially, that if any person, by force shall carry away, or shall by fraud or false pretence seduce, or cause to be seduced, or shall attempt so to take, carry away, or seduce any negro or mulatto from any part of the State to any other place what-

ever out of the State, with a design and intention of selling and disposing of, or of causing to be sold, or of keeping and detaining, or of causing to be kept and detained such negro or mulatto, as a slave or servant for life, or for any term whatever, every such person, &c., shall on conviction, &c., be deemed guilty of felony, and shall forfeit, at the discretion of the Court passing the sentence, a sum not less than \$500, nor more than a \$1000 ; and, moreover, shall be sentenced to imprisonment at hard labor for a period not less than seven years nor exceeding twenty-one years." Under this section a citizen of Maryland, named Edward Prigg, who was the agent for the owner of one Margaret Morgan, a fugitive slave, was indicted in the Court of Oyer & Terminer of York county for kidnapping. *The only evidence against him, and the only offence committed by him, as found by a special verdict, was that he had seized a fugitive slave within the limits of Pennsylvania, under full authority from her master, and carried her home to her master, in Maryland, where she was held to labor under the laws of that State.* Now, to us, it seems plain that this section could not apply to such a case, and could not have been so intended by the Legislature who passed it. There was ample scope for its operation upon persons who carried off negroes and mulattoes who were not slaves. What judgment the Court of original jurisdiction would have pronounced on the special verdict cannot be known, as the Court gave judgment against the defendant, "*by agreement*" of Messrs. Meredith and Nelson, his counsel, with Mr. Johnson, the Attorney General of Pennsylvania.—The Supreme Court of the State upon writ of Error, "*affirmed pro forma the judgment*" of the Court below ; and the defendant Prigg prosecuted his writ of error to the Supreme Court of the United States.—There is no cause of complaint against the jury, for they found the facts according to the truth, and submitted the question of law to the Court. There is no serious ground of complaint against the Court of Oyer and Terminer, for its judgment was pronounced *according to the agreement of the parties*. But it is not stated that the judgment of the Supreme Court of Pennsylvania was rendered, by agreement of the parties, nor ought that court to have rendered such a judgment as was pronounced, either by consent or otherwise. It is true that the judgment is stated to have been rendered *pro forma* : but no such judgment, so seriously and so extensively impairing the rights of citizens of other States, so vitally affecting the reputation of Pennsylvania for integrity and fidelity to the National Constitution, in a case almost too plain for argument, ought to have been rendered *upon any terms or in any form*. It was due to the character of the Court, and the State, and to the high purposes of justice, that the rights of the slave-holder, in a case so entirely free from difficulty or doubt, should have been sustained, at once, by the State Court.

Good taste and good faith alike pointed out this as the proper course. But this course was not adopted, and the citizen of Maryland was compelled to seek in the Supreme Court of the United States, that justice which had been denied in the State courts. Here an error of an opposite nature occurred. *The only question raised by the record was whether the peaceable recaption of a slave, recognized as property by the Constitution of the United States, could be converted by an act of State legislation into the crime of kidnapping.* Clearly the Supreme Court should have confined itself to that question. But instead of doing so, some of the Judges traveled far out of the record, discussing and deciding some of the most delicate and important rights of the States. Such a proceeding would have been highly reprehensible in a case where individual rights alone were involved. But it was monstrous when applied to questions affecting the rights of the great sovereignties composing this confederacy. They had no notice, or reason to apprehend that their powers of sovereignty were to be so extensively questioned.

Mr. Justice STORY delivered "*the opinion of the Court*;" and, in proceeding to do so, says: "We have given them (the questions) our most deliberate examination; and it has become my duty to state the *result* to which we have arrived and the *reasoning* by which it is supported."—Here, it will be observed that Justice Story announces himself distinctly as the organ of *the Court*—and to give to his *reasoning* as well as the *judgment* pronounced the force of authority, he distinctly claims to be entrusted not only with the duty of pronouncing the *result* to which the Court had arrived, but of stating the *reasoning* by which that result or judgment is supported. 16 Peters 610. In the course of the opinion he states that "the natural if not the necessary conclusion is that the national government, in the absence of all positive provisions to the contrary, is bound, through its own proper departments, legislative, judicial or executive, as the case may require, to carry into effect all the rights and duties imposed upon it by the constitution." Against this doctrine we have nothing to say. It is doubtless correct. But it does not follow that the States may not voluntarily bring their authority to the aid of the general government in the enforcement of constitutional rights. But Mr. Justice Story, as the organ of *the Court*, goes much further; after stating that the act of Congress of 1793 "covers the whole ground of the constitution, both as to fugitives from justice and fugitive slaves," he adds:—

"If this be so, then it would seem, upon just principles of construction, that the legislation of Congress, if constitutional, must supersede all State legislation upon the subject; and, by necessary implication, prohibit it.—For, if Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be that the State legislatures have a right to interfere, and

as it were, by way of compliment to the legislation of Congress, to *prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose.* In such a case, the legislation of Congress in what it does prescribe, manifestly indicates that it does not intend that there shall be any farther legislation to act upon the same subject matter. Its silence, as to what it does not do, is as expressive of what its intention is as the direct provisions made by it."

Here then is a plain repudiation of ALL legislation on the subject by the States, although such legislation be not in conflict with the legislation of Congress, but "*auxiliary*" to it. And even the "*silence*" of the national legislation is construed to be as expressive in prohibiting State legislation on the subject, although "*auxiliary,*" as its "*direct provisions!*" But the Judge goes still farther: at page 622, he takes up the question whether the power of legislation upon this subject is *exclusive in the National Government*, or *concurrent in the States, until it is exercised by Congress.* In our opinion" he adds "*it is exclusive.*" At the close of the opinion, he proceeds to pronounce "*the act of Pennsylvania*" (not merely the section upon which the indictment was framed, but the *WHOLE ACT*.) "*un-constitutional and void.*"

Mr. Justice WAYNE, (coming from Georgia, a slave-holding State,) not content with the manner in which Judge Story sustained the opinion of the Court, delivered a long argument enforcing the same views. In his 4th position he states distinctly "*that the power of legislation by Congress, upon the provision, is exclusive; and that no State can pass any law, as a remedy upon the subject whether Congress had or had not legislated upon it.*" 16 Pet. 637.

Mr. Justice BALDWIN concurred with the Court in reversing the judgment on the ground that the act of the legislature was unconstitutional, inasmuch as the slavery of the person removed was admitted, the removal could not be kidnapping. But he *dissented from the principles laid down by the Court as the grounds of their opinion.* 16 Pet. 636. Mr. Justice Wayne, however, states in his opinion, that Judge Baldwin concurs in opinion that "*if legislation by Congress be necessary, the right to legislate is exclusively in Congress.*"

Mr. Justice M'LEAN, not satisfied with the able argument of Judge Story, enforces the same doctrine also in a long opinion in which, *inter alia*, he states that "*it is therefore essential to the uniform efficacy of this constitutional provision that it should be considered exclusively a federal power. It is in its nature as much so as the power to regulate commerce or that of foreign intercourse.*" 16 Pet. 662. Justices CATRON and M'KINLEY were silent on the subject, and it does not appear whether both or only one of them concurred in the opinion of the Court as pronounced by Mr. Justice Story. It is said that Judge M'Kinley was absent.

Amid such a flood of Judicial error it is refreshing to read the powerful arguments of Chief Justice TANEY and Justices DANIEL and THOMPSON, in opposition to the doctrine so gratuitously promulgated as the *ground of the opinion of the Court*. Their dissenting arguments show that the *opinion of the Court* was understood to be that the States had no right to legislate on the subject *even in aid of the National Government, whether Congress legislated on the subject or not*.

Chief Justice TANEY, at page 627, expresses himself thus :—

"I do not consider this question as necessarily involved in the case before us. But, as the question is discussed in the opinion of the Court, and as I do not assent either to the doctrine or to the reasoning by which it is maintained, I proceed to state very briefly my objections. The *opinion of the Court* maintains that the power over this subject is so exclusively vested in Congress that no State, since the adoption of the Constitution, can pass *ANY law in relation to it*. In other words, according to the *opinion just delivered*, the State authorities are prohibited from interfering for the purpose of protecting the right of the master and aiding him in the recovery of his property. I think the States are not prohibited; and that, on the contrary, it is enjoined upon them as a duty to protect and support the owner, when he is endeavoring to obtain possession of his property found within their respective territories. The language used in the constitution does not in my judgment justify the construction given to it by the Court. It contains no words prohibiting the several States from passing laws to enforce this right. They are in express terms forbidden to make any laws that shall impair it. But there the prohibition stops. And according to the settled rules of construction for all written instruments the prohibition being confined to laws *injurious to the right*, the power to pass laws to support and enforce it is necessarily implied. And the words of the article which direct that the fugitive "shall be delivered up" seem evidently designed to enforce it as a duty upon the people of the several States to pass laws to carry into execution, in good faith, the compact into which they had solemnly entered with each other. The constitution of the U. States, and every article and clause in it, is a part of the law of every State of the Union; and is the paramount law. The right of the master therefore to seize his fugitive slave is the law of each State; and no State has the power to abrogate or alter it. And why may not a State protect a right of property acknowledged by its own paramount law? Besides, the laws of the different States, in all other cases, constantly protect the citizens of other States in their rights of property when it is found within their respective territories; and no one doubts their power to do so. And in the absence of any express prohibition, I perceive no reason for establishing, by implication, a different rule in this instance; where, by the national compact this right of property is recognized as an existing right in every State of the Union."

We have only given a portion of the clear and unanswerable argument of the venerable Chief Justice. His great ability as a jurist and his tried integrity as a man, give to his opinion a weight with the American people which is enjoyed by no man now living. We have always believed, and still believe that his opinion, *and not the opinion of the Court, as delivered by Judge Story*, contains the true exposition of the constitution

and is the law of the land. *That it will be maintained as such in the end is as certain as the perpetuity of the Union itself.* The opposite doctrine will be cast out as a dangerous heresy, altogether in conflict with the sovereignty of the States, at variance with the whole nature of our confederated government, and destructive of the rights of property which the Nation and the States are bound to respect.

Mr. Justice THOMPSON on this subject says :—

“Legislative provision in this respect is essential for the purpose of preserving peace and good order in the community. This legislation I think belongs more appropriately to Congress than to the States for the purpose of having the regulation uniform throughout the United States, as the transportation of the slave may be through several States; but there is nothing in the subject matter that renders State legislation unfit. It is no objection to the right of the States to pass laws on the subject that there is no power any where given to compel them to do it. Neither is there to compel Congress to pass any law on the subject. The legislation must be voluntary in both, and governed by a sense of duty.— But I cannot concur in that part of the *opinion of the Court* which asserts that the power of legislation by Congress is exclusive, and that no State can pass *any law* to carry into effect the constitutional provision on this subject; although Congress had passed no law in relation to it.”

Mr. Justice DANIEL, expressed his opinion in favor of that rule of action, on the part of the Court, *which involves no rights or questions not necessary to be considered; but leaves these for adjudication where and when only they shall be presented directly and unavoidably and when surrounded with every circumstance which can best illustrate their character.* After citing several cases to illustrate his positions, he proceeded :—

“Here then are recognitions repeated and explicit of the propriety, utility and regularity of State action, in reference to powers confessedly vested in the general government, so long as the latter remains passive or shall embrace within its own action only a portion of its powers, and that portion not comprised in the proceedings of a State Government and so long as the States shall neither conflict with the measures of the Federal Government nor contravene its policy. From these recognitions it must follow by necessary consequence that powers vested in the federal government which are compatible with the modes of execution just adverted to, cannot be essentially and originally, nor practically, exclusive powers; for whatever is exclusive utterly forbids all partition or association. I hold then that the States can establish proceedings which are in their nature calculated to secure the rights of the slave-holder guaranteed to him by the Constitution; as I shall attempt to show that those rights can never be so perfectly secured as when the States shall, in good faith, exert their authority to assist in effecting the guarantee given by the constitution. 16 Peters 656. He further declared that “the doctrines affirmed by the majority of the Court” were in his view “not warranted by the constitution, nor by the interpretation heretofore given to that instrument,” and the assertion thereof, he added, “seemed not to have been necessarily involved in the case.” 16 Pet. 658.

Here then we have it from the official report of the case that the ma-

jority of the Court did affirm that the powers in question were vested exclusively in Congress, and that the States had no right to legislate on the subject, *even in aid of the General Government!* We have it also, from the record, that this doctrine was understood by the *minority* to be so affirmed by the majority, and, for that cause, the Chief Justice, and Justices Thompson and Daniel placed their opinions on record dissenting from that doctrine, although they fully concurred in the *judgment* of the Court that the recaption of a fugitive slave by the owner could not be made criminal by State legislation. We have it also, from the record, that a majority of the Court held that the Federal Government was bound to carry into execution its own laws on the subject, by means of its own officers, executive and judicial, and that the State officers could not be required to accept jurisdiction under the act of Congress against the will of the legislative power of the States. Is it surprising, after this announcement from the Supreme Federal Judiciary, that the States should repeal the statutes which had been thus declared to be unconstitutional? Does any one in his senses suppose that surrendering fugitive slaves to the bondage of their masters is an employment so agreeable to the people of the free States that they would *force* their services in this respect upon their fellow-citizens of the slave-holding States? And if the *legislative power* of the States is not to be confided in on questions of this nature what reason is there for entrusting their *judicial power* with their solution? Was it any thing more than a rational mind might have anticipated, after the singular but unauthorized doctrine maintained by the Court in *Prigg vs. Pennsylvania*? The doctrine of that decision is utterly at variance with the limitations of power prescribed by the constitution, and at war not only with true liberty, but with the whole spirit of our federal system of government; and its promulgation, when not necessary to the decision of the case before the Court, was disrespectful to the dignity of the States as independent sovereignties. An invasion of State rights in a case where their *interests* were also concerned, would have justified the most strenuous resistance known to the constitution. But, in the instance before us, while the *rights* of the free States were violated, the *interests* of the slave States were alone impaired; for, without the aid of State legislation and State authority, the recovery of fugitive slaves is next to impossible. The most effectual method, therefore, of exhibiting the folly of the views entertained by a majority of the Court, was to carry out voluntarily the absurd doctrine of the Court, and let the public, and particularly those concerned, have a specimen of its practical operation.— This has been done. State legislation has been repealed, and State authority withdrawn. The result is as was anticipated: *almost an entire abrogation of so much of the constitution as requires the delivery of fugitive slaves.* The erroneous doctrine of the majority of the Court is now uni-

versally understood and as universally condemned. Let it be repudiated by the Court itself, on the first suitable opportunity; and let the States renew their efforts to have the constitutional compact executed in good faith. It is by respecting the rights of the States that we may hope to render our Union perpetual.

But the Union is not in danger. The descendants of those who established it know how to preserve it. Millions of enlightened and brave free-men stand ready to defend it with their lives and their fortunes. Public servants may prove unfaithful, but they will be degraded and dismissed. Misguided fanatics may seek to rob one class for the fancied advantage of another, but they will receive the doom of the highwayman who, under the false pretence of justice, robs one portion of community to give to another. Hot headed chivalry may delight in gasconade about disunion; but, when it dares to proceed to action, the rebels will be overpowered and scourged into obedience to the law by the strong arms of the true-hearted citizen soldiery of the country; and the ring leaders, instead of accomplishing their ambitious purposes, shall meet the fate of traitors, leaving behind them the festering infamy which still clings around the names of *Aaron Burr* and *Benedict Arnold*.

SUPREME COURT OF THE UNITED STATES.

The case of *Isaac Roach, Treasurer of the Mint of the United States, plaintiff in Error vs. The County of Philadelphia*, has been decided by the Supreme Court of the United States. A writ of Error had been taken to the Supreme Court of Pennsylvania. By the decision of that Court the lot on which is erected the Mint of the United States was held liable to taxation for county purposes under State laws. The State of Pennsylvania had never relinquished her right of taxation, nor had she given her consent to the purchase of the ground by the United States.—The Supreme Court of the United States affirmed the judgment of the State Court, thereby sustaining the right of the State to impose taxes upon the property, notwithstanding that it belonged to the United States.

We have perused with much gratification the argument of *BENJAMIN H. BREWSTER, Esq.*, in favor of the defendant in Error, in the Supreme Court of the Union. It displays great depth of research, and is fully imbued with the true spirit of our confederated system of government. It proves that the author is not only a sound constitutional lawyer but that he is a powerful champion on whom the State might safely rely in the hour of trial for the vindication of her rights of sovereignty. The sound legal abilities of Mr. Brewster, and the thrilling eloquence with which he enchains the attention of his audience, place him in the front ranks of Pennsylvania's most gifted sons.

In the District Court of Allegheny County.**MATTHEW MOILLE & CO. vs. HAYS & BLACK.*****Before Hon. Hopewell Hepburn, President Judge.***

1. Upon the purchaser's insolvency, an unpaid seller of goods has a right to stop them in the hands of any middleman or carrier, at any time before they reach their final destination or come into the purchaser's possession as owner.

2. This right is not defeated by the goods being intercepted and marks changed by an agent unless it were done for the purpose of taking possession under authority and on behalf of the purchaser as owner.

3. A delivery of the goods to a drayman, or other person, for the purpose of being taken to a transportation office and then shipped to the purchaser is not such a delivery as will prevent the right of stoppage in transitu.

4. The seller's right of stoppage in transitu is not defeated by a seizure of the goods while in transit under writs of foreign attachment issued by other creditors against the purchaser.

5. The purchaser's notes given for the price of the goods, need not be tendered back before stopping the goods on account of his insolvency.

6. Where the carrier holds the goods for the attaching creditors and his own claim for freight is paid by the plaintiff in replevin before the execution of the writ, the action will not be defeated on the ground that the freight was not paid before the writ was issued..

This was an action of Replevin, brought to recover possession of a lot of merchandise in the hands of defendants, agents of D. Leech & Co's. transportation line.

In the spring of 1847, Jesse Rhodes, being engaged in merchandising, at Massillon and Uhricsville, Ohio, sent his agent, Absalom Baker, to Philadelphia to purchase goods. Purchases from different houses in Philadelphia, to the amount of several thousand dollars, on a credit of six months, were made by Baker, as agent for Rhodes, whose notes were given.

The goods were directed to Jesse Rhodes, Massillon and Uhricsville, were collected by the drayman of At-

wood & Cormany, to whom a memorandum for that purpose was given by Baker, and being delivered by the drayman at the transportation office of D. Leech & Co., were shipped by them, in the name of Atwood & Co., to Bagely & Smith, Pittsburg.

After the goods were shipped, Rhodes was discovered to be insolvent. One of the firm of Ludwig, Kneedler & Co., from whom a bill had been purchased, being about to follow and stop their goods, it was agreed between him and Baker, that he (Baker) should follow and stop the goods and hold possession until security should be given by Rhodes, and on his failure to give security, Ludwig, Kneedler & Co.'s goods should be sent back to them. All the goods were stopped at Hollidaysburg, and the marks changed by Baker, the name of Rhodes and the direction on the boxes being erased, and a private mark, called a diamond letter, substituted. The goods were then forwarded to Pittsburg, by D. Leech & Co., with a memorandum on the manifest, to the care of S. A. Wheeler & Co., Akron. It was in evidence that Akron was a point of intersection with the Ohio canal, on the usual route of transporting goods from Pittsburg to Massillon and Uhricsville.

Upon the arrival of the goods at Pittsburg and while yet in the hands of defendants, agent of D. Leech & Co.'s. line, they were seized under writs of Foreign attachment, issued by certain New York creditors of Rhodes. They were then replevied by the Philadelphia merchants from whom they had been purchased.

Magraw & McKnight, Shaler & Stanton, for Plaintiffs.
Williams & Kuhn, for Defendants.

HEPBURN J. This is an action of replevin brought by Moille & Co., against Robert S. Hays and George Black, to recover the possession of certain boxes of merchandise in the possession of the defendants. It appears from

the evidence that the defendants are mere stakeholders, being the agents of the forwarding house of D. Leech & Co., of this city, and have probably no interest in the questions on trial. The controversy arising between the plaintiffs, merchants residing in Philadelphia, who sold the goods in question to Jesse Rhodes of Massillon, Ohio; and certain New York Creditors of the said Rhodes, who have issued Foreign attachments against him, and attached the goods in the hands of Hays and Black; summoning them as Garnishees. The right of these respective claimants it will become our duty to determine.

The plaintiffs, it is conceded, were the original owners of the merchandize in question.

In May 1847, Jesse Rhodes sent his agent Absalom Baker, to Philadelphia, to buy goods on Rhodes' account.—He did so to the amount of some thousands of dollars, and gave them Jesse Rhodes' note at six months for the amount of the invoice. The goods were packed and directed to Jesse Rhodes, Massillon, Ohio. Thus marked, the goods according to the usual course of business in this respect, were collected at one store or by one of the persons who had sold goods to the purchaser, and by them delivered to the transportation office to be forwarded to Pittsburgh. This service was performed by Atwood & Co., no doubt under the order and directions of Mr. Baker, the agent of Rhodes. Atwood & Co. then shipped the goods by D. Leech & Co's. line to Bagely & Smith, a forwarding and commission house of this city.

After these goods had left Pittsburg, it appears that a portion of other purchases made by Baker were attached at Philadelphia in the hands of J. Brown & Co., by certain New York creditors of Rhodes, and it seems to have been apprehended by some who had sold to Rhodes, that the residue of the goods would be attached in this city. Hence Ludwig, Kneedler & Co., were about to send a

member of their firm to arrest their goods in Hollidaysburg. They agreed, however, with Baker, the agent; that he should go forward and stop the goods at that place and not deliver them to Rhodes until he gave good security for the amount of their bill. If he failed to do so the goods were to be returned to them in Philadelphia.

The plaintiffs were no parties to this arrangement.—But Baker proceeded to Hollidaysburg and there (by order of the carriers, Harris and Leech, it is said on the manifest,) stopped the goods, erased the marks upon the boxes of those now in question, and re-marked them with a private mark, without any direction. But on the boat's manifest they were directed to be forwarded to the care of S. A. Wheeler, Akron, Ohio; which it appears is on the usual route of canal transportation to Massillon and Uhricsville. The goods being so marked arrived in Pittsburgh, and were attached by Wood and Sheldon, and other creditors of Rhodes, and were replevied by Moille & Co., the vendors. The question is who shall hold the goods, the vendors or the attaching creditors?

The plaintiffs contend, that after the sale and shipment of these goods to Rhodes, and before he had received them, it was ascertained that he was insolvent, and that consequently, they had the right to pursue and retake the goods at any time before they came to the actual or constructive possession of Rhodes, the vendee. When a vendor sells goods on credit to another, he has a right to resume the possession of the goods, while they are in the hands of a carrier or middleman, in their transit to the consignee, or vendee, and before they arrive into his actual possession, or to the destination which he has appointed for them, on his becoming bankrupt or insolvent. This the law calls the right of stoppage in transitu, and it can only be exercised as between the vendor and vendee, and as the property is vested in the vendee by the con-

tract of sale it can only be revested in the vendor, during its transit to the vendee, under the existence of the above circumstances. 2 Kent's Com. 540, Story on Sales 257, Smith Mercantile Law 547.

The insolvency of the vendee, Rhodes, is the groundwork of the plaintiffs claim, and this is a fact for your decision. Was Rhodes insolvent when these goods were replevied by the plaintiffs? It is not necessary to prove insolvency that he should have been declared a bankrupt or insolvent by a judicial tribunal, nor that he should have made an assignment of his property. If the fact exist, no matter how proved, if sufficiently and satisfactorily proved, the law requires no more. Story on Sales 270. You have the testimony of Baker that Rhodes was indebted some \$60,000, and that his assets were but \$26,000, and that his creditors were watching for these goods on the line of transportation, and actually attached them before they reached Ohio, for debts which he was not able to pay—sufficient to satisfy you, I presume, of Rhodes' entire insolvency. The fact however is for you to determine.

The next question is, had the transit of these goods been determined before they were replevied?

The transitus of the goods, and consequently the right of stoppage is determined by actual delivery to the vendee or by circumstances which are equivalent to actual delivery. 2 Kent's Com. 543, cases cited. It is not however every constructive delivery that will destroy the right in question. The delivery to a carrier or packer to and for the use of the vendee or to a wharfinger is a constructive delivery to the vendee, but it is not sufficient to defeat the right, even though the carrier be appointed by the vendee. 2 Kent's Com. 545. It will continue until the place of delivery be in fact the end of the journey of the goods and they have arrived to the possession or un-

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der the direction of the vendee himself. It is also settled that the transitus is at an end if the goods have arrived at an intermediate place, where they are to remain stationary, under the orders of the vendee, and until by his directions they are again put in motion for some new and ulterior destination. They are however to be deemed in transitus as long as they remain in possession of the carrier as such, even though such carrier may have been appointed by the consignee himself, and also while they are in any place of deposit connected with the transmission and delivery of them, and until they arrive at the actual or constructive possession of the consignee. *Smith's Mercantile Law* 552, *Story on Sales*, sec. 335, 336, 337.

The cases upon the subject of constructive delivery abound in refined and subtle distinctions. Chancellor Kent seems to be of the opinion that a solvent for the difficulty may be found in this rule: "That if the delivery to a carrier or agent of the vendee be for the purpose of conveyance to the vendee, the right of stoppage continues, notwithstanding such a constructive delivery to the vendee; but if the goods be delivered to the carrier or the agent for safe custody or for disposal on the part of the vendee, and the middleman is by assent converted into a special agent for the buyer, the transit or passage of the goods terminates, and with it the right of stoppage." 2 *Kent's Com.* 545. The rule no doubt is entirely correct, with the exception of the case of goods delivered on board a ship belonging to or chartered by the vendee, which in effect, is a delivery to the vendee himself. *Bolin vs. Hoffnagle*, 1 *Rawle R.* 9.

The goods in question had not arrived at the end of their journey, neither had they arrived at the possession or actual control of the vendee. But the defendants contend, "that the delivery of the goods to *Atwood & Company*, upon the order of *Baker*, and their shipment by

Atwood & Co., under his instructions, was such a delivery to the vendee as excludes any right of stoppage in transitu on the part of the vendor." But for what purpose were the goods delivered to Atwood & Co? Was it for safe keeping or disposal? Certainly for neither. Then, was it for transportation to the vendee? The testimony shows that they merely collected them for transportation, and the fact that they were immediately transmitted on their way to Ohio, is satisfactory, that they were delivered for no other purpose, that they were still *in transitu*, and that the right of stoppage was not at an end.

Was the interception of the goods at Hollidaysburg by Baker, taking possession of them, and re-marking them, such a change of their destination by the assent of the vendee, as to arrest the transitus and operate as a complete delivery of the goods to him?

Doubtless if the vendee himself had intercepted the goods at that or any other point, and taken the actual possession of them, *as owner*, the transitus would have been at an end, and in like manner, if his authorized agent had taken possession *on his account*, for the same purpose, it would have the same effect. But what authority had Baker to intercept the goods on Rhodes' account at that place? According to his own testimony he did it as the agent of certain creditors of Rhodes, and for their benefit, so that in fact it may have been an exercise of the right of stoppage in transitu, by the vendors, though I do not perceive that he made much effort for the protection of those by whose orders the stoppage was made.

The circumstance that he erased Rhodes' name, and still forwarded the goods to Akron on their way to Massillon, appears to evince a desire to get them safely on their passage, and rather to facilitate than to intercept their transmission to their original destination,—certainly Wheeler was not the owner, as Rhodes himself was in

Pittsburg on the arrival of the goods, endeavoring to obtain their liberation.

In Story on Sales, sec. 336, it is said if the agent hold them for the purpose of transmission to the vendee, the vendor's right of stoppage exists. And in *Whitehead vs. Anderson*, 9 Meeson and Welsby 534, *Parke, Baron*, observes: The law is clearly settled that the unpaid vendor has a right to retake the goods before they have arrived at the destination originally contemplated by the purchaser, unless in the meantime they have come into the actual or constructive possession of the vendee. A case of constructive possession is where the carrier enters expressly or by implication into a new agreement distinct from the original contract for carriage, to hold the goods for the consignee as his agent, not for the purpose of expediting them to the place of original destination, pursuant to that contract, but in a new character for the purpose of *custody* on his account and subject to some new and further order to be given to him. It appears to us very doubtful whether the act of making, or taking samples, or the like, without any removal from the possession of the carrier, as though with the intention of taking possession, would amount to a constructive possession, unless accompanied with such circumstances as to denote that the carrier was intended to keep and assented to keep the goods in the character of an agent for custody. 9 M. & W. 534. This case is cited with approval in *Donath vs. Broomhead*, 7 Barr 304, by Judge Rogers. I see nothing, therefore, in the transaction to put an end to the transitus at that point.

It is also contended that if the goods were consigned to Pittsburg, where they were to be subject to the order of the vendee, as to their further transportation, their transitus was ended on their arrival at this point.

If the facts were so the law is correctly stated. The

goods would then have arrived at the end of their journey. But they were consigned to Bagely & Smith, and never reached their possession, but were arrested in the hands of the defendants, agents of Leech & Co., the first carriers. Neither is it certain that if they had been delivered to Bagely & Smith, they were to be retained for further orders from the consignee or the person to whom directed. It is the duty of the forwarding house to expedite goods to their place of destination, and they would fail in that duty if they did not as soon as practicable send them as directed, without delay for any further order than that found in their manifest, or the directions on the goods themselves.

Nor do I think that the defendants' first point, the seizure under writs of foreign attachment, presents any difficulty in the way of the plaintiff's recovery. The creditors of the consignee can obtain no greater right over the goods than the consignee himself had when the attachment was served; the right of stoppage in transitu is not defeated by the goods being attached by process of foreign attachment, any more than by the right of a carrier to retain for general balance. 1 Campb. 248. 3 T. R. 464. 3 B. & P. 42. 15 Wend. 137. 17 Wend. 504. 23 Wend. 611. 8 Pick. 198.

The act of the 3d April, 1799, Dunlop 85, perhaps, occasions greater difficulty. But the object of that act was to prevent delay, and to protect the officers of the law from vexatious and protracted litigation, and not to deprive a third person of a valuable right, and as far as I have been informed has not been extended to cases of foreign attachment. The case in 1 Miles Rep., is an authority in support of this position.

The object of foreign attachment is to compel the appearance of the defendant, and for that purpose he is attached by his goods and chattles, &c. This is not such

an absolute seizure of the goods as will prevent the issue of a replevin for the same goods, particularly so when the plaintiff in replevin is a merchant claiming the goods under his right of stoppage in transitu. The authorities are full that this right is superior to that of attaching creditors and I think the right may be enforced by replevin.

The defendants also contend that they had a lien for freight, which should have been paid or tendered, before this suit can be maintained.

The carriers had a lien, and were entitled to payment of their freight before the goods could be taken from their possession. But this does not prevent the claim of the vendor as against the vendee, and in fact the freight was paid before the actual seizure of the goods, and before they were removed from the defendant's possession. This would appear, then, rather as a question of costs, than one affecting the result of the case between the real contending parties, and I am disposed to think that this matter is not put in issue by the pleadings. At all events, that the parties may have an opportunity of determining the merits of the case, and as the point is now unimportant to the litigant parties, it is answered in the negative. The purchaser's notes given for the price of the goods need not be tendered back before stopping in transitu.—*Smith's Merc. Law* 550. 2 *Meeson & Welby* 374. *Abbott on shipping* 408. 9 *Mass. Rep.* 72.

The plaintiffs' seventh point is therefore answered in the negative.

Upon the whole case then, I am of the opinion that the plaintiffs are entitled to a verdict.

Verdict for the plaintiffs.

Supreme Court of Pennsylvania, December 18, 1849.**GAS COMPANY vs. NORTHERN LIBERTIES.**

1. How far a city, Borough or District Corporation may regulate the *time* in which a Gas Company may, under its charter, open and dig up the paved streets for the purpose of laying gas pipes.

2. Such regulations must be reasonable and for the common benefit, not in restraint of trade, nor imposing a burden without an apparent benefit.

3. An ordinance prohibiting a Gas Company, *between the 1st December and 1st March*, from opening or digging up any paved streets, within the incorporated district, for the purpose of laying gas mains along the same, provided it shall not be construed to prevent the introduction of gas into premises fronting on streets in which the gas mains have been laid, is reasonable and valid.

4. An ordinance prohibiting the digging up the street for the purpose of introducing the gas into premises on the opposite side of the street to that on which the gas mains are laid, is unreasonable and invalid.

5. The Court will take notice of the regular course of the seasons; and what is a reasonable and necessary regulation is a question for the Court to decide.

ROGERS, J. By the 11th section of the act of the 16th March, 1819, incorporating "The Commissioners and Inhabitants of the Incorporated District of the Northern Liberties," the board of commissioners, elected by the inhabitants of the district, are empowered "to make, ordain, constitute, and establish such and so many laws, ordinances, and regulations, as shall be necessary for the governing of the district and the welfare thereof," and by the 16th, 17th and 18th sections they are invested with full jurisdiction over the streets and highways of the district.

With this full and plenary power granted to them, to be exercised for the benefit and welfare of the inhabitants, it will not admit of question, a general authority is conferred to prevent the opening and digging up paved streets in the district, except in the manner, and at times, to be

prescribed by them, and that a general ordinance, such as the one in question, would be valid, as well against the Gas Company, who stand in the same category as inhabitants, as against any other person or persons whatever.— The ordinance, which is for a limited time merely, is a regulation, and not a restraint of trade, as is clearly shown by all the cases cited. Nay, it may be absolutely necessary to prevent an obstruction or stoppage to the trade of the district, of which the public, as the inhabitants or others having commercial relations with them, would have a just right to complain. If then, this be an undoubted authority expressly granted to the corporation, for the purpose stated, it remains to inquire, whether this power is restrained, altered, or impaired by subsequent legislative enactment. The plaintiff in error contends, that the ordinance conflicts with the 8th section of the charter of incorporation of the Gas Company, which provides “ that the trustees thereof shall have the management of all the affairs of the company, and it shall be their duty to construct and maintain suitable works for the manufacture of carburetted hydrogen gas, from bituminous coal and other substances, for the purpose of public and private illuminations; and whenever applications in writing shall be made by the owners or occupiers of property upon any street or parts of streets within the district of the Northern Liberties, or dividing the same from any adjoining district, the amount of which, in the judgment of the said trustees shall be sufficient to yield a net profit to the company equal to six per cent. interest upon the expense of conveying and distributing the same, they shall cause to be laid pipes along such street and streets or part of such street or streets, for the purpose of lighting the same, provided that whenever the public highways of the said district are broken up and disturbed by means of the introduction of the pipes for the distribution of gas, the

same shall, as soon as practicable, be repaired by the trustees at their own cost and expense, under the directions of the superintendent of highways, or other agent appointed by the commissioners of the said district." It is contended this section overrides and annuls the general power given to the municipality for the regulation of streets and highways, so far as regards the laying the pipes for the distribution of gas. But we do not so understand the charter of the gas company. There is nothing, that we can perceive, inconsistent in the powers claimed by both. It is conceded, that the district cannot, on the ground of the public welfare, pass an ordinance, which conflicts with, adds to, or controls the provisions of the charter granted to the Gas Company; and no person doubts the power of the legislature to restrain, or alter, as they may deem proper, the provisions of their charter. But where, in a subsequent act, in favor of a private corporation, it is sought to control the general powers before granted to a public corporation, the intention of the legislature ought distinctly to appear. Any ambiguity in the grant must be construed against them, and in favor of the public. The rule of construction, in all such cases, is that any ambiguity in the charter of the company, must operate against the corporation and in favor of the public. 2 B. & Ad. 793. 2 M. & G. 196. 11 Peters 545. 4 Bingham 452. 11 East 685. 6 Peters 738. 1 Am. Law Jour. 362. "It would present a singular spectacle," says Chief Justice Taney, in 11 Peters 545, "if while the courts in England are restraining within the strictest limits the spirit of monopoly, and exclusive privileges in the nature of monopolies, and confining corporations to the privileges given them in their charter, the courts in this country should be found enlarging their privileges by implication, and construing a statute more unfavorably to the public and the rights of the community, than would be

done in a like case in an English court of justice." The rule is, as is said, in the *Trenton Water Power Company*, 6 Penn. Law Jour. 32, that private corporations take their franchises subject to the rights of individuals and communities, and the strong presumption of the law is always against unconditional adverse privileges. The right of a private corporation to break up the public highways of a municipality in the exercise of a franchise conferred upon them by an act of assembly, is necessarily subject to the reasonable municipal regulations of the district, enacted for the common good of all its inhabitants, unless *especially excluded* by the act conferring the right. That there is in the charter of the Gas Company a direct express restriction, or exclusion, will not be pretended, nor is there a necessary implication, that we perceive, to that effect.—The powers of both are in harmony with each other; certainly, not necessarily repugnant. The Gas Company cannot complain if the ordinance is found to be a reasonable exercise of the right vested in the municipality. At common law, (here the power is expressly given,) corporations have power to make by-laws for the general good of the corporation. They must, however, be reasonable and for the common benefit, not in restraint of trade, nor imposing a burden without an apparent benefit. The ordinance here, as has been before remarked, is a regulation as to time, and not a restraint of trade; it neither conflicts with the expression nor the presumptions of the charter of the Gas Company. Is the regulation reasonable and necessary, is the only question, and this is a question for the court. 16 Pick. 127, *Goddard's case*. In our opinion it is both reasonable and necessary. The ordinance prohibits the Gas Company (placed in the same category as an individual) or any other person or persons, between the first day of December, in any year, and the first day of March following, from opening or digging up any paved

street within the incorporated district of the Northern Liberties, for the purpose of laying gas mains or pipes along the same: provided, nothing therein contained shall be construed to prevent the introduction of gas into premises fronting on streets in which the gas mains have been laid. The object of the ordinance, as I understand, is to prevent the breaking up of paved streets, where there are no mains for the purpose of introducing gas. It is expressly provided this may be done where the premises front on the streets where the gas mains have been laid. We are bound to notice the regular course of the seasons, and it is well known that from the prevalence of frost, and the inclemency of the weather, within the period designated, nothing could be more inconvenient or a greater obstruction to trade, than breaking paved streets in the district which cannot be repaired in ordinary time, nor except at a serious expense and trouble. We have, it is true, pleasant weather at that time, sometimes, but it seldom occurs, and its continuance is most uncertain; it would be unwise to base the law on exceptions rather than general rules. The inconveniences suggested on the argument, are more imaginary than real, for but little inconvenience can arise to the owners of property from a short delay, certainly nothing in comparison to the injury which results from disturbing the streets in that inclement season; and this for the sole purpose of supplying one or more of the inhabitants with gas. Nor is this suggestion entitled to much favor when we reflect that if deprived of its use, it is because they have not thought proper to apply in proper time. If a case of emergency should arise, and it is difficult to imagine how it can, by a proper application to the board, permission may be obtained for that special purpose. The ordinance seems to be framed with a proper regard to the company, and the welfare of the public.

Although it does not form part of the case stated, we have been requested by both parties to give the opinion of the court, on the 3d section of the same ordinance, which prohibits the Gas Company, or any person or persons, to dig up any paved street within the district, in order to introduce the gas into any premises on the opposite side of the street to that on which the gas mains are laid, without permission from the board. The effect of the ordinance is, to compel the company to construct two mains one on each side of the street, instead of one, thereby materially increasing the expense to the company, and consequently enhancing the price of the gas to the inhabitants of the district. This we think an unreasonable exercise of authority, and consequently not within the power of the board. A by-law must be reasonable, and for the common benefit, it must not be in restraint of trade, nor ought it to impose a burden without an apparent benefit. 10 Wend. 95, *Village of Buffalo vs. Webster*; 7 Paige 261, *The Mayor of Hudson vs. Thorne*; 14 Wend. 87, *Stokes vs. City of New York*; Willes, 388.

Judgment affirmed.

E. S. Miller and T. Sergeant for plaintiff in Error.

Brightly for defendant in Error.

New York Court of Chancery.

WINDT AND OTHERS vs. THE GERMAN REFORMED CHURCH.

S. C. 4 Sand. C. R. 471.

1. The sepulture of friends and relatives in a cemetery belonging to a religious society, confers no right or title upon the survivors, and they cannot pre-

vent the sale of such cemetery by the corporation and the removal of the interred remains, where such removal is in other respects conducted according to law.

2. The payment of fees and charges to the corporation or its officers, upon interments, gives no title to the land occupied by the body interred. The payment confers the privilege of sepulture for the body in the mode used and permitted by the corporation; the right to have the same remain undisturbed as long as shall be required for the entire decomposition of such remains, provided the cemetery shall so long continue to be used as such; and the right, in case the cemetery shall be sold for secular purposes, to have such remains removed and properly deposited in a new place of sepulture.

3. The conveyance of vaults or burying lots in a cemetery by a religious incorporation, confers a perfect right of property on the grantee, independent of any use of the same for sepulture.

Dec. 23, 1846; Jan'y 8, 1847.

The bill was filed in December, 1846, by John Windt, and several other persons claiming under similar rights, and a temporary injunction issued, (with an order to show cause,) restraining the defendants from removing the remains of the dead, from the cemetery formerly owned by them in Twelfth street, near University Place in the city of New York.

The case made by the bill, was this. The defendants, a religious incorporation, bought the ground in question in 1823, and devoted it to the purpose of a cemetery for their church and for the public use. It has been used for those purposes accordingly, from thence until quite recently, and a great many deceased persons have been interred there. Each of the complainants, has near relatives whom he has caused to be interred in the cemetery, and each is either a member of the defendants congregation, or has paid to the defendants the usual burial fee of three dollars on having such interments made. The defendants, alleging that they have sold the ground, have given notice that the bodies interred there must be removed by a fixed time, in default of which the defendants will cause them to be removed and re-interred in their new cemetery in Bushwick, Long Island. The time fixed having elapsed,

the defendants have commenced removing the remains of the dead, which the bill alleged they have no right to do. It also charged great carelessness, rudeness and misconduct, in the manner in which the removal was making.

The defendants on showing cause, read affidavits and documents setting forth, that they as a religious corporation purchased the ground in question, being two adjacent lots, each twenty-five feet front and rear by about seventy-five feet in depth, in April 1824. They own the lots in fee, and have used them as a cemetery, but have sold no burial plats or vaults therein; nor has any person by any written instrument, acquired any right of interment there. That the lots are remote from their church and congregation, in a densely populated vicinity, and altogether too small for a cemetery. That for the latter purpose, they have purchased a tract in Bushwick, and their corporation being in debt and greatly embarrassed, they were compelled to sell the lots, in order to save their church from sale. That in pursuance of the act of April 11, 1842, respecting cemeteries, and on the written consent of more than three-fourths of the members of the corporation, they petitioned the Court of Chancery, and in October 1846, obtained an order from the Vice-Chancellor, authorizing them to sell the lots, according to the provisions of that act. They have accordingly sold and conveyed them in fee to Jasper Grosvenor, for \$6000, have received the whole price except \$500, and have covenanted with him to remove the remains of the dead there interred, within sixty days from October 22, 1846. They gave sufficient notice to enable the friends of the latter to remove such remains, and were proceeding, in default of their assuming the task, with all proper care and consideration, to transfer such remains to the new cemetery in Bushwick.

E. Norton, for the complainants. We claim—1st, by

purchase of the right to inter, and 2d, by a dedication of the cemetery to the public use.

The privilege of burial, for which the fees were paid, was not conditional. It was an absolute right, and the use of the ground for the repose of the remains of such persons, cannot be discontinued by the defendants. The right may be regarded as an irrevocable easement. The consent of the corporators to sell, cannot impair such a right; and the covenant of the corporation to remove the dead, does not affect us. The burial of the dead in these lots, gratuitously, was a dedication to the public use as a cemetery, and conferred equally the privilege of repose for those interred pursuant to such permission. Is there to be no such thing as a public burying ground, where the remains of the dead may continue undisturbed?

W. B. Lawrence, for the defendants.

The principle of the bill is utterly impracticable; else the whole earth will in time be appropriated for the remains of the dead. The instances of the removal of cemeteries in this city, have been frequent, and they are legal.

The defendants own this land exclusively. The complainants have no right whatever in it. An interest in land, can only be acquired by deed. (1 R. S. 738, § 137.) Yet the bill claims that the mere interment and payment of the trifling fee for opening the cemetery, gives a perpetual interest in the soil to the deceased or his surviving friends.

The whole subject was eloquently discussed by Lord Stowell, in *Gilbert vs. Buzzard*, 3 Phill. 335, where he denied the right to be interred in iron coffins. No one has any title or interest in the remains of his ancestor. (2 Bl. Comm. 429,)

The decision of the Court on the application and order of sale, is conclusive, and the expediency of the sale cannot now be reviewed. *Dutch Church vs. Mott*, 7 Paige;

Brick Meeting House case, in 3 Edw. Ch. R. 155. The whole proceeding has conformed to the act of 1842, (laws of 1842, page 259,) which makes ample provision for the protection of both the living and the dead, and subjects all persons infringing its provisions, to criminal punishment. This Court does not interfere to prevent crimes; and besides, the bill is multifarious. (The counsel also cited 2 Mann. & Ryl. 333; 1 Greenleaf's Laws of N. Y. 73.)

THE VICE-CHANCELLOR.—The defendants became seized of the two lots in question in 1824, and converted them to the purpose of a cemetery for their religious society.—The complainants have relatives interred there, but no one of them has any deed of a vault or a portion of the ground, or any title thereto. No such deed or conveyance has been executed to any person. The whole title has remained in the corporation.

The sepulture of friends and relatives, in such a burying ground, confers no title or right upon the survivors. If the latter have any interest in the cemetery, or control over its use and disposal, it can only be as corporators in the society owning the ground.

The only protection afforded to the remains of the dead interred in a cemetery of this description, is, by the public laws prohibiting their removal, except on the prescribed terms; and in a still stronger public opinion. Probably, these furnish all the protection which is consistent with the exigencies of a large city, the population of which increases with marvellous rapidity, and whose wants leave but little room for the remains of the dead, in the dense and crowded haunts and thoroughfares of the living.

Where vaults or burying lots, have been conveyed by religious corporations, rights of property are conferred upon the purchasers. This was the case with the corporation of the Brick Presbyterian Church. 3 Edw. Ch. R.

155. The right is like that to any other real estate, and is as perfect without sepulture, as it is where the grantee has used it for that purpose.

The payment of fees and charges to the corporation or its officers, upon interments, gives no title to the land occupied by the body interred. It confers the privilege of sepulture for such body, in the mode used and permitted by the corporation; and the right to have the same remain undisturbed, so long as the cemetery shall continue to be used as such, and so long also, if its use continue, as such remains shall require for entire decomposition; and also the right, in case the cemetery shall be sold for secular purposes, to have such remains removed and properly deposited in a new place of sepulture.

This, I am satisfied, is the whole extent of the legal rights and privileges conferred by interment, and the payment of the customary charges, in the burying grounds of our religious corporations.

In common with other corporations of the same class, these defendants were authorized, upon an order obtained from the Court of Chancery, to sell any of their real estate. The statute providing for the incorporation of such societies, gives them power, among other things, to regulate the perquisites for the breaking of the ground in their cemeteries or church yards, and burying the dead; and while it conferred the unrestricted authority to sell all their lands, except that it was to be on the order of the Court, there was no prohibition or regulation concerning the disposition of the remains of the dead, on a sale of their church-yards or burying grounds. It was thus left for the Court of Chancery, to exercise all the control and restraint, that could by law be imposed upon the unnecessary or unseemly alienation of cemeteries.

In 1842, the legislature imposed farther restraints. The
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act in relation to burying grounds, (Laws of 1842, ch. 215, p. 259,) provides that no church, or religious corporation shall mortgage any burying ground, without the previous consent in writing of three-fourths in number of the congregation or society composing such church or corporation; and to provide for the case of a sale, it requires the like consent, before any dead bodies or human remains shall be removed from any burying ground, which shall within three years have been used for that purpose; with the intent to convert the ground to any other purpose.—Both sections apply to cases in which compensation has been made for interments.

It is at least a question, whether, since this act, the Court of Chancery retains any control over the subject, considered merely in reference to the previous use of land for the purpose of burial; on an application for its sale or mortgage, where the requisite consent has been obtained.

In this instance, the corporation were seised in fee of the lots, and they had parted with no vaults, or other rights inconsistent with their exclusive dominion over them. On an application to this Court, showing the necessity of selling the lots to save their church lots from being sold for their debts; that the size of the lots was totally inadequate for a cemetery; and that three-fourths of their congregation had consented in due form; an order was made authorizing a sale of these premises. The defendants have made a sale pursuant to an order, have executed a conveyance, and received the price.

I entertain no doubt that their sale was valid, and that they have a perfect legal right to remove the human remains now interred in the two lots, to their new cemetery at Bushwick.

It is painful and deeply abhorrent to the sensibilities of our nature, to have the remains of beloved friends and re-

latives disturbed in their last homes, and removed by rude and careless hands, to a distant cemetery, not hallowed by any of the associations which encircle the consecrated ground where we have deposited them in sadness and in sorrow. I confess that I have not become so much of a philosopher, as to regard the bodies of deceased friends, as nothing more nor better than the clods of the valley; and that my sympathies were strongly enlisted in behalf of these complainants, vindicating the repose of the bones of their kindred. But I cannot shut my eyes to the clear light of the law as applicable to the case.

The temporary injunction must be dissolved, and the order to show cause discharged, with costs to be taxed.

Orphans' Court of Armstrong County.

BILL FOR THE RECOVERY OF A LEGACY.

ABRAHAM NEAL vs. JOHN TORNLY, *et al.*

1. Where a devisor gives a power to his executors to sell his real estate and directs that "the *purgator* is to hold the amount of his grandchildren's *shares* till they come of age by giving good and *sufftion* security and *poing* the *intrust* of *these* money" the money is a charge on the land in the hands of the purchaser and a payment to the executor is no defence.

Asamas Boyers died some time in the year 1836, after having made his last will and testament, in which are the following clauses: "I give and bequeath unto my children John Byers, Henry Byers, David Byers, Elizabeth Neal, Susanna Neal, Fanny Stoop, and Jean Klingensmith, my plantation containing one hundred and sixty seven acres and allowance, * * * to be equally divided amongst them, excepting tow hundred and forty dollars which my wife received of her father and put into this plantation.—

This money I give and devise unto Catharine Byers, Elizabeth Neal, Abraham Byers, Susanna Neal, Fanny Stoops, Jane Klingensmith, and Simon Byers, which is to be paid out of the land after it is sold. I also give and devise unto the aforesaid legatees, their heirs, the aforesaid plantation to have and to hold forever. The place is to be sold at publick seale when the see cause. And I give and bequeath the legacy of Elizabeth Neal, who died, to her children Margred Byerly, Abraham Neal, and William Neal; Margred Byerly is to have thirty dollars, and Abraham Neal and William Neal to have all the residue of their mother's legacy forever; but the purgesor of my plantation is to hold the amount of this childrens shears in my plantation till they come of age, by giving good and sufition security and pailing the intrust of these money. I also appoint my tow sons, John Byers and Abraham Byers, to be the executors of this my last will and testament; and lastly of all, I apoint, nomaneate, authorise and empower John Byers, the aforesaid executor, to sell and convey my real estate."

The whole tract of land, devised, had been aliened by the executors to John Torny, the defendant, who had accepted the conveyance and paid the purchase money, without taking any security against the legacies payable to the children of Mrs. Neal; and the only question before the Court was, whether these legacies were a charge on the land in the hands of the purchaser.

Defendant contended that the executors had full and ample power under the will, to sell and convey; and that having exercised that power, the land could not be followed into the hands of the purchaser.

The Opinion of the Court was given by KNOX, P. J., as follows :

"Asamas Byers, by his last will and testament, bequeathed the proceeds of a tract of land to his children

and grandchildren, appointing his sons, John and Abraham, his executors, and authorizing John to sell and convey the estate.

Elizabeth, one of the daughters, was dead prior to the making of the will, and her interest was bequeathed to her children Margaret Byerly, Abraham Neal, the petitioner, and William Neal, with the direction that the purchaser of the plantation was to hold the amount of their share in the land until they come of age, by giving good and sufficient security, and paying the interest of the money.

John Byers, by virtue of the authority contained in the will of his father, sold and conveyed the land to his brother and co-executor Abraham Beyer, who afterwards sold to John Torny—the full purchase money, as appears by the answer, having been paid by Abraham to John, and by Torny to Abraham, without any reservation as to the interest of the minor children of Mrs. Neal.

The only question in the case for our decision is, whether the legacy to this petitioner is, by the will, charged upon the land, and of this we have no doubt. Although the words used to express the intention of the testator are awkward and inapt, yet that it was intended that this money should remain in the hands of the purchaser, is manifest. He is directed to hold the amount in his hands until the children should arrive at the age of 21 years; thereby negating the idea that it was to be paid by the purchaser. It is true, he was required to give good and sufficient security for its payment, but upon neglect to conform in this respect, it by no means follows that the security which the law gives, viz: the land itself, is to be withdrawn from the claimant. It was the business of the purchaser to see that the provisions of the trust were complied with, and if he neglected this, he must resort for remedy to his grantor."

Decree accordingly.

Court of Appeals of Kentucky.**BURGIN vs. CHENAULT, et al. S. C. 9 Ben. Monroe's R. 285***Appeal from Madison Circuit.*

1. In determining the lines of old surveys, where resort cannot be had to marked trees or natural objects, the magnetic variation from the true meridian, at the time of making the original surveys, should be ascertained.

2. The variation of the needle is a matter of fact and not matter of law.

Judge BRECK delivered the opinion of the Court.

The first and second instructions moved on the part of the defendant, are mainly predicated upon the magnetic variation of the compass. They virtually ask the Court to tell the jury, that in running or ascertaining the disputed line, if marked trees or natural objects were not found, course and distance were to govern, but that proper allowance was to be made by them for the variation of the needle at the time the survey in this case was made, from the true meridian. The Court refused to give the instructions, but said to the jury "that no allowance was to be made for the variation of the needle in said line, that the needle only varied from the true meridian for about thirty years, and then commenced running back, and that it had about time to get to its greatest variation and back to the true meridian since the date of Calloway's original survey."

There was no error, we think, in overruling the instructions asked, but we are not satisfied the Court was right in the instruction given.

The only evidence in the record, in regard to the variation of the compass, was that of the witness, Crook, who appears to have been a surveyor, although not the

one who made the survey and connected plat in this case. He stated that the variation of the compass since 1785, (the date of Calloway's survey,) from the meridian, would be at least one and three-fourth degrees to the east of the true meridian. The question is whether it was practicable for the jury to determine, from this testimony, where the line from the agreed corner, calling to run north, would run, or what allowance was to be made by them for the variation of the needle at the time the survey in this case was made, from the true meridian. We think not.—The line which should govern, in view of the variation, could only be ascertained by an actual survey upon the ground, and with more testimony than the record contains.

According to the case of *Vance vs. Marshall*, 3 Bibb, 150, the original survey of Calloway is to be regarded as made according to the *magnetic* and not the *true* meridian. In ascertaining, therefore, where the line in question should run, the magnetic meridian in 1785 should be ascertained, or which would be the same thing, the magnetic variation at that time from the true meridian; and a line run according to that variation from the agreed corner at A. upon that plat, would be the true line. This is upon the supposition, of course, that the line cannot be ascertained by marked trees or natural objects.

The proposition of the Court appears to be based upon the idea that the original survey of Calloway was made according to the true meridian, and that at that time there was no magnetic variation. Whether upon this hypothesis the needle would have vibrated to its greatest extreme of variation and back again to the true meridian, since the date of the survey, or in about sixty years, is a question, we think, of fact, and not of judicial cognizance. Besides, the material fact upon which the principle is predicated, is not established by any thing appearing in the

record. It is not shown that the needle was on the true meridian in 1785. It is true, if it be assumed that the variation is always at a uniform rate, and invariably continues up to a given point and never passes it, that the needle at any point which might be assumed at a certain determinate period, would be at the same point again.— But such facts cannot be judicially assumed, nor the determinate period known.

Wherefore, the judgment is reversed, and the cause remanded, that a new trial may be had in conformity with the principles of this opinion.

Turner for appellant; Caperton for appellees.

Supreme Judicial Court—Maine.

MASON vs. MASON.

Assumpsit will not lie by one tenant in common against another for rents and profits of the common estate.

The parties to this action were tenants in common of a parcel of land, of which the defendant was in possession. The plaintiff undertook to cut grass upon the premises, but was forbidden by the defendant, who cut it himself. The plaintiff afterwards brought an action of *assumpsit* (declaring in a count for money had and received,) for one half of the income of the land. The defendant objected that *assumpsit* would not lie by one tenant in common against another for the rents and profits of the common estate.

Howard and Shepley, for the plaintiff.

Fessenden, Deblois and Fessenden and True, for the defendant.

The Court (by SHEPLEY, J.) sustained this position, de-

nying the position of the plaintiff that an action of *account* would lie, and therefore *assumpsit* would lie also. An action of *account* will not lie, at common law, by one tenant in common against another, and the statute of Anne, which altered the common law, gave the action of *account* only where one tenant in common received more than his just share as bailiff. And in England, under this statute, it has been decided that the tenant, who takes the income merely, is not liable in an action of *account*;—he must be the bailiff of the other tenant, and, as such, receive more than his share. There is no case in which an action of *assumpsit* has been sustained on any different principle, and none can be sustained unless money has been actually received, or one tenant holds the share of the other as bailiff. The case of *Munroe v. Luke*, (1 Met. 459,) was decided on this principle. The defendants, in that case, took the whole rents and profits in money.

Judgment for defendants.

1 M. L. Rep. 120.

Law Miscellany.

CONSTITUTION OF KENTUCKY.

The Convention of this State has just finished its labors in remodeling and *liberalizing* its Constitution. The new Constitution was signed by every member of the Convention, with the exception of Garrett Davis, whose principal objection was to the popular election of Judges :

“ Elections are to be held biennially on the first Monday of August, in the years 1851, '53, '55, &c., for members of Congress, half a Senate, a full House of Representatives, &c. At each alternate election a Governor, Lieut. Governor, &c., are to be chosen. Judicial elections are to be held on the second Monday in May of the same years. Electors are always to vote *viva voce*, except dumb persons, who may vote by ballot.”

A fair and *republican* representation in the State is effectually secured by the following provisions :

"The State is to be apportioned for the choice of Senators and members by the Legislature of 1850, by that of 1857, and every eighth year thereafter. The basis of representation is the number of qualified voters; and to secure uniformity and equality of representation, the State is hereby laid off into ten districts, whereof each shall receive its full share of representation—that is to say, the full number of Senators and Representatives to which each District is entitled, shall be apportioned among the counties of that District, so that no part of the State shall lose a portion of its weight in the Legislature by reason of its numerical strength being wasted in unrepresented fractions."

This provision is novel, so we believe is the following, and very good, moreover :

"*Provided*, That when it shall appear to the General Assembly that any city or town hath a number of qualified voters equal to the ratio then fixed, such city or town shall be invested with the privilege of a separate representation, in either or both Houses of the General Assembly, which shall be retained so long as such city or town shall contain a number of qualified voters equal to the ratio which may, from time to time, be fixed by law; and thereafter, elections for the county in which such city or town is situated shall not be held therein; but such city or town shall not be entitled to a separate representation, unless such county, after the separation, shall also be entitled to one or more Representatives. That whenever a city or town shall be entitled to a separate representation in either House of the General Assembly, and by her numbers shall be entitled to more than one Representative, such city or town shall be divided, by squares which are contiguous, so as to make the most compact form, into Representative Districts, as nearly equal as may be, equal to the number of Representatives to which such city or town may be entitled; and one Representative shall be elected from each district. In like manner shall said city or town be divided into Senatorial Districts, when by the apportionment more than one Senator shall be allotted to such city or town; and a Senator shall be elected from each Senatorial District; but no ward or municipal division shall be divided by such division of Senatorial or Representative Districts, unless it be necessary to equalize the Elective, Senatorial or Representative Districts."

The regulations of the Judiciary are thus detailed :—

A Court of Appeals, to consist of four Judges, chosen by the four quarters of the State respectively, and of

whom three shall form a quorum, is constituted. The Legislature may reduce the Judges to three upon the occurrence of a vacancy. Each Judge is to serve for eight years, except three of the four first chosen, who shall serve two, four and six years respectively, as shall be decided by lot. The first Judicial Election is to be holden on the second Monday in May, 1851. Judges of Appeals must be thirty years old and of eight years' experience in the law. A Clerk of Appeals is to be chosen by the people in 1851, and every eight years thereafter.

The State is to be divided by the next Legislature into twelve Judicial Districts, each electing one Circuit Judge, (twelve instead of nineteen at present.) A Commonwealth's Attorney and Circuit Court Clerk will be elected at the same time with the Circuit Judge. The Circuit Judges are all elected for six years. The Legislature may create one additional District every four years, but not more than four new ones in all until the population of the State shall exceed 1,500,000.

County Courts shall also exist, consisting of a Presiding Judge and two Associates for each county, elected for four years.

Finally, each county shall be divided by the Legislature into suitable Districts, each electing two Justices of the Peace, to serve for four years.

The Slavery Question Again.—The following extract from the speech delivered on the 7th March, 1850, in the United States Senate, by the Hon. DANIEL WEBSTER, will shew that the Great Expounder of the Constitution disapproves of the doctrines of the majority of the Judges of the Supreme Court of the United States, as expressed by Justice Story in deciding the case of *Prigg vs. Pennsylvania*. Mr. Webster's speech had not been delivered at the time our leading article in the present num-

ber was written, and we now insert the extract for the purpose of sustaining our own views. Nothing can be plainer than that the Constitutional command to "*deliver up*" fugitive slaves imposes an obligation upon the States, and that the members of every State Legislature are not only authorized to legislate on the subject, but are bound by their oaths of office to do so in fulfilment of the Constitution. The extract from Mr. Webster's speech follows :—

"In that respect, it is my judgment that the South is right and the North is wrong. Every member of every Northern Legislature is bound by oath to support the Constitution of the United States ; and this article of the Constitution, which says to these States they shall deliver up fugitives from service, is as binding in honor and conscience as any other article. No man fulfils his duty in any Legislature who sets himself to find excuses, evasions and escapes, from this Constitutional duty. I have always thought that the Constitution addressed itself to the Legislatures of the States themselves, or to the States themselves. It says that those persons escaping to other States shall be delivered up, and I confess I have always been of the opinion that it was an injunction upon the States themselves. When it is said that a person escaping into another State, and becoming therefore within the jurisdiction of that State, shall be delivered up, it seems to me the import of the passage is, that the State itself, in obedience to the Constitution, shall cause him to be delivered up. That is my judgment. I have always entertained it, and I entertain it now. But when the subject, some years ago, was before the Supreme Court of the United States, the majority of the Judges held that the power to cause fugitives from service to be delivered up was a power to be exercised under the authority of this Government."

Fugitive Slaves.—The Judiciary Committee of the House of Representatives of Pennsylvania, through their Chairman, Hon. JAMES M. PORTER, on the 7th March, 1850, unanimously reported in favor of repealing such portions of the act of 3rd March, 1847 as prohibited State officers from taking jurisdiction under the act of Congress of 1793, relative to the surrender of fugitive slaves. The Committee speak of the decision in *Prigg vs. Penn'a.*, and state that the act of 1847 was passed "*after that decision and most probably in consequence of it.*" The report is a learned and able one, and the influence it may have in the Legislature and elsewhere may be inferred from the names of the Committee who gave it their unanimous approbation. The names of these distinguished and patriotic gentlemen are Hon. JAMES M. PORTER, AUGUSTUS K. CORNYN, Hon. JOHN N. CONYNGHAM, JOHN B. PACKER, DANIEL M. SMYSER, CRAIG BIDDLE, JOHN S. RHEY, HARRISON P. LAIRD, and GLENNI W. SCOFIELD.

"Judicial Encroachment."—In an able article under this head, in the March number of the Democratic Review, complaint is made against the United States' Courts, who are charged with encroaching upon the Common Law Courts, and upon the trial by jury, by means of an unauthorized extension of the Admiralty Jurisdiction. The writer of that article does not, of course, impugn the motives of the distinguished Judges of the Federal Courts; but he boldly charges "*that the course and current of the decisions of the Federal Judiciary have been, from the beginning, tending to deprive parties coming before them of the TRIAL BY JURY; that the Courts of the United States have, IN THE FACE OF POSITIVE PROVISIONS, and IN VIOLATION OF THE INTENTIONS OF THE PEOPLE, USURPED the decision of questions which were not for them to decide.*"

We have an earnest desire to preserve to the Supreme Court of the United States the respect and confidence of the people. Our wish is equally strong to preserve to the States and to the people all the rights of sovereignty which they have not granted to the General Government. These objects are only attainable by carefully confining the court within the limits of its jurisdiction, as established by the Federal Constitution.

Professional Ethics.—In 2 American Law Journal, p. 381, we expressed an opinion, from the evidence then before us, that the charge against Counsellor Philips, which imputed to him the offence of "defending Courvoisier, by attempting to show, after the prisoner had confessed his guilt to Mr. Philips, that the crime was committed by others, was disproved. It was not our intention, at the time, to endorse the professional conduct of Mr. Philips, in defending a prisoner *after he had confessed his guilt to his Counsel*, but merely to give him the benefit of an acquittal of the aggravated crime of attempting to throw the suspicion of guilt upon parties known by himself to have been entirely innocent. The examination of the subject, which has recently been made in England by editors and others who have taken a part in the discussion, leaves great reason to believe that we were mistaken in the opinion we expressed in favor of Mr. Philips, limited and cautious as it was. His friends now take defence for him under Lord Brougham's celebrated rule of professional morality that the advocate "should feel no other duties, obey no other calls than those which attend him in the capacity of the advocate." In 1 American Law Journal 307, Judge Lewis, in deciding the case of *Mishler & Hertzler vs. Baumgardner*, pronounced Lord Brougham's rule "unsound in professional morality." We regret to perceive that our brethren in England should entertain any difference of opinion upon the question whether a Counsellor can, *consistently with sound morals*, attempt

to procure the acquittal of one who has, in sane mind, voluntarily confessed his guilt to his advocate. There is but one rule of morality for lawyers and laymen. No man has a right to expect an advocate to offend his God and disgrace the profession by an effort to defeat truth and justice. And no advocate, with a knowledge of his client's guilt, can so limit his exertions as to be "faithful to his client," and at the same time to be true to the spirit of his obligation to "use no falsehood."

ELECTION OF JUDGES IN PENNSYLVANIA.

The amendment to the Constitution, providing for the election of Judges by the People, finally passed the House of Representatives, on Thursday, March 14, 1850, by a vote of 92 to 3! It had previously passed the Senate, and now the amendment only requires to be ratified by the People, to become a part of the Constitution of the State. That it will receive the approbation of the People, by a very large majority, there is no doubt.

New Publications.

A TREATISE ON CRIMES AND MISDEMEANORS. By Sir William Oldnall Russell, Knt., late Chief Justice of Bengal. By Charles Sprengel Greaves, Esq., of Lincoln's Inn and the Inner Temple, Barrister at Law, and a Magistrate for the County of Stafford. Sixth American from the third London edition, with the Notes and References contained in the former American editions by Daniel Davis and Theron Metcalf, Esqrs. And with additional Notes and References, by George Sharswood. In two volumes. Philadelphia: T. & J. W. Johnson, Law-Booksellers, No. 197 Chesnut street. 1850.

The demand for a new edition of this work attests the professional estimation in which it is held. Of late years we have had many Treatises, American and English, on the simple but fruitful law of Criminal Jurisprudence. But notwithstanding all these, one of the most voluminous works still holds its original place, and is still read, studied, and relied upon by the Bar. The work itself is as complete and accurate a digest and collection of the law upon the several branches of which it professes to treat as is practicable. The professional reader will here find every thing that he can wish; the earliest cases, decisions and text writers have been diligently searched, collected and digested; the very fountains and sources of the crown law have been sought out, and may here be found. The modern English and American decisions are also placed either in

the text or the notes, with much care and a reasonable degree of fulness. The learned editor has departed from the practice of omitting portions of a foreign book on the ground of the inapplicability of the chapters to the law of this country. All the chapters heretofore omitted have now been reprinted in full, and the work fairly and entirely given to the profession as it came from the hands of its learned and distinguished author, enriched by the learned, accurate and useful notes of Mr. Justice Sharswood.

A SYLLABUS of the Law of Land Office Titles in Pennsylvania. By Joel Jones. Philadelphia: Published by Henry Perkins, 22 South Fourth street. 1850.

This succinct little compend is the work of the Hon. Joel Jones, who for some years presided over the District Court of the city of Philadelphia, where his urbanity and professional learning were highly satisfactory to the members of that Bar. He is now Mayor of the city of Philadelphia, and amid all his varied and constant avocations in that responsible and harrassing office, has found time, with the true love of the thorough bred lawyer, to prepare this work on a somewhat complicated if not intricate branch of legal learning in this Commonwealth. He tells us in his preface that "This work is a mere initiatory compend of the most important principles of the Law of Land Office Titles in Pennsylvania, designed chiefly for the use of students, and adapted to their wants. It was not the design of the author to treat any branch of the subject at length, but to give an abridged yet accurate expression of the principal acts of Assembly and decisions of the Courts relating to the subject.

A considerable part of the matter was delivered in a course of Lectures a few years ago, before the Law Academy of Philadelphia. In preparing it for the press, the form has been somewhat changed—some of the topics treated more at length, and a few added. Those who are well versed in this branch of the law will observe, no doubt, some omissions; but the design of the author will be attained, if the way of the student to explore the sources of this branch of the law is made plain and easy.

The Law of our Land Office Titles does not form a part of the course of study usually prescribed for admission to the Bar. Yet it is neither abstruse nor difficult; and if it were, it should not be overlooked by those who aspire to a scientific, systematic, and thorough knowledge of the laws of the Commonwealth."

The subject of land law, always an interesting one, has attracted considerable attention in our State. In 1810 the late Charles Smith, Esq., prepared a note embracing a history of land titles up to that time. (2

Smith Laws p. 105. 307.) This was printed under the authority of the Legislature. This note contained a collection of most valuable materials; the industry and research of the learned editor having brought to light many important documents and facts that had lain buried in the archives of the Land Office, almost useless to those of the public who were interested in the study or use of our system of land laws. It also presented for the first time the manuscript notes of the late Judge Yeates of the decisions of the Supreme Court of this State on that subject, which have been always esteemed of high value, from the eminent abilities of that learned Judge, and his special acquaintance with the course of land laws before the revolution as well as after; and which, with others, have been since published in his Reports. To the learned and accurate note of Mr. Smith, every one who has to deal with our land laws must become indebted; nor can any one expect to attain an acquaintance with them, without the careful study of it. In 1838, the Hon. Thomas Sergeant prepared a View of the Land Laws of Pennsylvania. This was an effort to supply the deficiency and fill up the void which thirty years of legislation and adjudication had made, during which time disputed points had been settled and much light had been thrown on the doctrines of the land law by the learning and diligence of both the Bench and the Bar. The Treatise of the learned Judge has always been esteemed by the profession.

Within the year last past the Hon. Charles Huston, late a Justice of the Supreme Court of the State, as the last act of a long and useful life, has given to the profession his Essay on the History and Nature of Original Titles to Land in the Province and State of Pennsylvania, published at Philadelphia by the Messrs. Johnson, a book containing many valuable documents and much and varied learning on the subject of the land laws, and to which the diligent student will hereafter resort as a store house of erudition. Within a few months after its publication the venerable Judge passed to his grave.

And now, in 1850, yet another and a third judge, "a living oracle of the law of the land whose knowledge is derived from experience and study from the viginti annorum lucubrationes which Fortescue mentions" gives to his professional brethren a Syllabus of the Law of Land Office Titles in Pennsylvania, a book which will be studied with satisfaction both by the student and the practitioner, and which will guide the one and inform the other.

THE
AMERICAN LAW JOURNAL.

MAY, 1850.

New York Supreme Court.

THE NORTHERN RAIL-ROAD COMPANY vs. JAMES DUANE.

At the January General Term held at Balston Spa, in Saratoga County, before Willard, Hand and Cady, Justices.

1. An alteration in the charter of a Rail-Road, made by the Legislature, on the application of the Directors, in a case where a right to alter the charter is reserved to the Legislature, does not absolve a subscriber to the stock from his obligation to pay future instalments, although such alteration be made without the consent of such subscriber, provided the alterations be such that the Directors in applying for them are guilty of no breach of trust towards such subscriber, or such company.

2. *It seems* that alterations in a charter made by the Legislature, not prejudicial to any stockholder, afford no bar to a recovery on the stock subscription—and evidence tending to shew the object, intention and effect of such alterations is admissible.

3. Where the charter to a Rail-Road corporation contained a clause author

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ising the Directors, in case of non-payment of the instalments upon the stock subscriptions, as they shall be required to be paid, to declare the forfeiture of the stock and all previous payments, it was held, that an action lay to recover the instalments as they fall due, although there was no *express* promise to pay.

4. The forfeiture is a cumulative remedy.

This action was brought to recover several instalments due to the plaintiffs, on twenty shares of stock subscribed by the defendant, under the act incorporating the plaintiffs, passed May 14, 1845, (L. of 1845 p. 351.) It was commenced and put at issue under the code of 1848. The complaint states, that after the commissioners opened their books, as required by the statute, the defendant, on or about the 1st day of January, 1846, "did subscribe for twenty shares of the said stock, amounting to the sum of ten hundred dollars, and thereby promised to take twenty shares of the said stock subject to the conditions, requirements, liabilities and benefits of the said act, and said defendant then and there paid \$250 upon each share of said stock so subscribed by him as aforesaid." It then sets out the different calls for instalments, and notice thereof, and the neglect and refusal of the defendant to pay.

The answer, after admitting the organization of the plaintiffs, as a corporation, and the defendant's subscription to the stock, the several calls for instalments, and his refusal to pay, says, that the defendant subscribed for the construction of a Rail-road from Ogdensburgh to Lake Champlain, as provided for by the act of May 14, 1845, and for no other purpose; that his subscription was made with reference to the powers, privileges, obligations and liabilities in and by the act created and declared, and also in and by the act to provide for the construction of a Rail-road from Attica to Buffalo, passed May 3, 1836, and which is recited in and made a part of the plaintiffs charter.

The answer then sets up that after the defendant's sub-

scription, and before any payment by any of the subscribers, the Directors, without his knowledge, applied to the Legislature for an alteration of their charter, and that body by the act of 9th March, 1847, passed an act entitled, "An Act to amend the act incorporating the Northern Rail-Road Company," and thereby authorized them to borrow money for the construction of their rail-road, to an amount not exceeding one half the sum paid in by its stockholders, and also to pay interest to stockholders for stock payments made by them beyond general calls, upon condition that the company should construct their road with the heavy iron rail, weighing at least 56 pounds to the lineal yard, and whereby said corporation are further authorized to construct one or more branch lines, and the construction and regulation thereof to be subject to all the provisions of the act of 1845; and it alleges that the plaintiffs have accepted the amendments and acted under them; wherefore the defendant insists that he is exonerated and discharged from his subscription.

The reply of the plaintiffs is, that by the original charter, the Legislature reserved a right to alter it; that the company has not yet accepted the act of 1847, and that there is nothing in that act, which discharges the defendant from his subscription.

The cause was tried at the St. Lawrence Circuit in June 1849, before Mr. Justice HARRIS. On the trial the organization of the company was shewn, and also the various steps which had been taken by them towards the construction of their road. It was shewn to be for the interest of the company to use the heavy rail, and that the Directors had intended to use it before the act of March 9, 1847, was passed.

Several objections were raised by the defendant to the plaintiffs right of recovery, none of which need be stated but the one on which the learned Justice directed a ver-

dict for the defendant. He decided that the second section of the amendatory act was such a departure from the previous charter of the company, as to entirely absolve the stockholders from all liability upon stock subscriptions, and on that ground directed a verdict for the defendant. To which decision the plaintiffs' counsel excepted.

The plaintiffs' counsel offered to prove that no action by the company had ever been had upon the construction of branch lines, nor had that part of the act been adopted in any manner by the company; that the Northern Railroad, for a part of its length, runs within a mile of the Canada line, and that at the time of the passage of the act, it was in contemplation by the people of Canada to build two lines of rail-road from the Province line, thus near this road, to Montreal, and that the intention of this amendment was to give this company the right, by a short branch, to connect with one or both of those roads. The learned Justice rejected the offer, to which the plaintiffs again accepted. The plaintiffs have appealed from the decision at the Circuit, on a bill of exceptions, and they now ask for a new trial.

James and Brown for the plaintiff.

John Hutton, for defendant.

WILLARD, J. The second section of the act of March 9, 1847, (L. p. 18,) amending the plaintiff's charter, is in these words: "The said company (the plaintiffs) is hereby authorized to construct one or more branch lines of rail-road, to connect the line authorized to be constructed by the act above mentioned, with one or more lines of rail-road to be constructed in Canada East; such branch lines, and the construction and regulation thereof, to be subject to all the provisions of the act incorporating said company, passed as above mentioned."

It is not alleged in the answer, nor was it proved on the trial, that the alterations of the plaintiffs' charter, per-

mitted by the section just quoted, would be prejudicial to the defendant, or any of the other stockholders, if the same should be adopted by the company. The question, therefore, raised by the first exception, is, whether an act of the Legislature which authorizes a rail-road incorporation to connect itself, by one or more branch lines to other rail-roads in its vicinity, is, *per se*, such an alteration of the contract of a subscriber to the stock of the company as to absolve him from his subscription, unless his prior assent to such alteration be shewn. Under the original charter, § 18 of L. of 1836, p. 326, the plaintiffs "had a right to cross, intersect, join, or unite with any rail-road company, canal company, or private company, when associated under any *law of this State*," &c. The amendment was supposed to be necessary to enable the plaintiffs to connect their road with one or more which might be constructed in *Canada East*. In the case of the Harford and New Haven Rail-road Company vs. Crosswell, 5 Hill 383, the alteration in the charter introduced an entire new line of business, by allowing the company to purchase and charter steamboats to an amount not exceeding two hundred thousand dollars. This was held to be such an alteration as absolved the stockholders who did not assent to it, from their subscriptions to the original stock. But Nelson Ch. J., in delivering the opinion of the Court, concedes, that some formal alterations of a charter, or those which are clearly beneficial, or at least not prejudicial to the stockholders, do not work this consequence. In the last mentioned case, the amendatory act increased the capital stock of the company two hundred thousand dollars. In effect, it made a new contract between the corporation and its stockholders. The defendant might have been willing to incur the hazard of becoming a common carrier of passengers and freight, on a rail-road, for the sake of the anticipated benefits, but

averse to increasing that responsibility by connecting with it the business of a common carrier by water. But, in the present case, no such change was contemplated. The identity of the plaintiffs road was not affected by the act. The *termini* continued the same. The stocks remained unaltered in amount. No new burthen was cast upon the company which they were compelled to perform. A privilege merely was conceded to them, apparently advantageous to their interest, and which they were at liberty to accept or decline at their pleasure. Unless every act of the Legislature affecting a corporation, passed between subscribing for stock and payment thereof, will discharge the subscription, the act in question cannot have that effect. On the doctrine laid down by the learned Judge, at this Circuit, the general rail-road act of 1848, would discharge every stockholder who had not paid up his subscription. The general act imposes duties and obligations upon companies, previously formed, unknown to the original charter, and which could not have been anticipated by the stockholders when they inquired for stock.

The stock subscription in this case was declared to be *subject to the conditions, requirements, liabilities and benefits of the act*—[the charter]—one of the conditions of which was that the Legislature might at any time alter or repeal it. The passing of the act of the 9th of March, 1847, amending the original act of incorporation, did not impair the contract entered into between an individual subscriber for the stock and the corporation. There was no stipulation entered into between the corporators and the corporation, that the Legislature should not exercise the power which they had reserved to themselves. On the contrary, it must be presumed to have entered into the contemplation of the stockholders, when they subscribed, that the charter might be altered before the company completed their road. In this respect also, this case dif-

fers from the Hartford & New Haven Rail-road vs. Crosswell, *supra*. No such clause, authorizing the Legislature to alter the charter, was contained in their act of incorporation; and, of course any alteration would be invalid unless made on the application of the company.

But while it is conceded that the Legislature have the right, on their own motion, to alter the charter of the plaintiffs, without invalidating any subscription of the stockholders, still, it is insisted, that if such amendatory act be passed, on the application of the Directors, it certainly absolves the stockholders from all liability upon their stock subscription. The learned Justice who tried this cause appears to have been of this opinion. In this we think he erred. The only ground on which the alteration of a charter on the application of the Directors should be treated as impairing the right of the Directors to enforce a stock subscription is, that such application was made in fraud of the rights of the subscribers, and was a breach of trust. The Directors are trustees for the company. They are bound to consult and to promote its interest. If an alteration of the charter, beneficial to the company, can be obtained, it is their duty not only to assent to it, but perhaps, also, to petition for it. If such alteration would be so far prejudicial to the interest of the company, that an assent to it by the Directors would be a breach of trust, the stock subscriber may, in such case, successfully resist an action brought by the former to enforce payment for the stock. This, we apprehend, is the true principle on which the cause should be placed. It was not shewn that the plaintiffs, Directors in this case, violated any trust reposed in them by assenting to the amendatory act; and, hence the subscribers are not absolved from their subscription.

We have hitherto treated the subject as if a Legislative alteration of a charter, made on the application of the

Directors, prejudicial to the company, and without the assent of the individual subscribers, absolved the latter from their contract, if such application of the Directors amounted to a breach of trust. The cases on this subject, in our sister States, have not been uniform. In some of them, the alteration of the charter has been treated as an alteration of the contract ; in others, it has not been so regarded. Thus in Pennsylvania, in *Ervin vs. The Turnpike Company*, (2 Penn. Rep. 466,) the subscriber was held bound, notwithstanding a change in the location of the road made by an act of the Legislature against his remonstrance, and obviously to his prejudice. In *Gray vs. The Monongahela Navigation Company*, (2 Watts & Serg. 156,) the same learned court held, that an alteration in the charter, by which additional privileges were granted to the corporation was not such a violation of the contract of subscription as would relieve the subscriber, although the additional privileges might extend the liabilities of the company, and thus incidentally affect him.

The cases cited from Massachusetts, arose under their turnpike acts, and are not applicable. The *Middlesex Turnpike Corporation vs. Larke*, 8 Mass. 268, turned upon a question of pleading. The plaintiffs declared on an express contract, and were bound to prove it as laid. The defendant had engaged to pay assessments for making a turnpike in a certain specified direction. The Legislature, on the application of the company, but without the defendant's assent, altered the course of the road.—The promise to pay assessments to build the road in one direction, did not warrant a recovery for assessments made to build a road in another direction. See 10 Mass. 384.

Assuming the law to be as decided by this Court in 5th Hill 382, *supra*, we think the learned Judge erred in ruling, that the amendatory act worked a discharge of the defendant's contract.

II. We think the learned Judge erred also, in rejecting the plaintiffs' offer to prove that the second section of the amendatory act had not been accepted by the company, or acted upon by them; and, in rejecting the offer to prove the reasons and intentions of the amendments of the charter. The evidence offered and rejected, tended to shew that the privilege granted to the company, by the act allowing the construction of branches to such road as should be built in Canada East, leading from the Canada line to Montreal was advantageous to the company and the defendant, as one of the stockholders. If the principle on which the plaintiffs were defeated, be, that they assented to an alteration in the charter, prejudicial to the defendant, against his consent, surely the plaintiffs should be permitted to shew in reply, that no such consequences were intended or accomplished, and that the alteration was in fact beneficial to him.

These two points are all that properly arise on this bill of exceptions. On another trial, there are other questions which may again arise, upon which, as they have been discussed by counsel, a few words may be said.

(1st.) It is urged that the only remedy of the company against a defaulting stockholder is the forfeiture of his stock and previous payments, under the 14th section of the act of 1836, p. 319. Such seems to be the rule in Massachusetts, when there is no *express* promise to pay the amount of the subscription; 6 Mass. 40. 8 do. 138. 10 do. 327, &c. In this State, the plaintiffs have been allowed to elect either remedy. The cases on this point are uniform for nearly half a century. Union Turnpike vs. Jenkins, 1 Caine's R. 381. S. C. in Error 1 C. C. in Error 86. 9 J. R. 217. 14 do. 238. 14 Wend, 20. Herk. Man. Co. vs. Small, 21 Wend. 275, S. C. 2 Hill 127. 21 Wend. 296.

(2nd.) It is contended that here was no express prom-

ise to pay; that the defendant merely subscribed for twenty shares of stock, &c., and did not, in terms, promise to pay the amount; and that the remedy is by a forfeiture, &c. The 3rd section of the charter (L. of 1845, p. 351) declares that the capital of the company shall be two million dollars divided into shares of fifty dollars each, and it appoints commissioners to receive the subscriptions and distribute the stock. The 4th section requires a payment of two dollars and fifty cents on each share, at the time of the subscription. The 14th section (L. of 1836, p. 325) enacts, "that it shall be lawful for the Directors to require payment of the sums to be subscribed to the capital stock at such time and in such proportions, and on such conditions as they shall see fit, under the penalty of the forfeiture of their stock and of all previous payments thereon," &c. It has already been shewn that forfeiture is only a cumulative remedy. In the case of the *Herkimer Man. Co. vs. Small*, *supra*, the stock subscription was exactly like the one in this case, and assumpsit was held to be well brought thereon. The law will raise a promise on the part of the defendant to pay the amount of the share for which he subscribed, and which the act requires him to pay. Proof of the subscription will support an allegation of a promise in the pleading.

We think the judgment of the Circuit Court should be reversed, and a new trial be granted. The costs of the reversal to abide the event of the suit.

CADY, Justice, concurred.

HAND, Justice, dissented.

Supreme Court of New York.***Monroe Special Term, July, 1848. Welles, Justice.*****THE PEOPLE, *ex rel.* OWEN AND OTHERS vs. DAVISON.****S. C. 4 BARBOUR 109.**

1. What acts, committed by the defendant in an ejectment suit, will be considered as amounting to *waste*, proper to be restrained by an order of the Court, under the statute, upon the application of the plaintiff: where the defendant has been in possession for many years, claiming the premises in fee, in his own right, and in hostility to the plaintiff.

2. A person in possession of land under such circumstances should, until he is legally evicted, be permitted to remain in the full enjoyment thereof, to the extent that he would be were no adverse claim set up; subject to the restriction that he shall not commit a permanent and lasting injury to the inheritance.

Previous to October, 1845, the relators commenced an action of ejectment against the defendant to recover the possession of certain premises in the town of Greece in the county of Monroe, being a farm of about 145 acres, claiming to own the same in fee. On the 31st of October, 1845, the late Supreme Court, on the application of the plaintiffs (the relators) made an order, reciting that satisfactory proof had been made, that the defendant had committed waste upon the premises in question since the commencement of the said action, and restraining him from the commission of further waste, &c. At the Monroe general term held in March, 1848, upon an *ex parte* application of the relators showing that the defendant had violated the order by cutting down and carrying away the growing and standing timber and wood upon the said premises, since the service upon him of the said order, an order was made that an attachment issue against the defendant. At the Monroe special term held in May, 1848,

at which the attachment was returnable, the relators and defendant appeared, and interrogatories were filed by the relators. The defendant filed his answer, in which he fully purged the contempt by denying or explaining the acts of waste charged: whereupon, an order was made on motion of the relators, referring it to the clerk of Monroe county to take and report the proofs of the respective parties, touching the question of waste. At the present term the referee made a report of the proofs taken by him, consisting of the depositions of some eighteen witnesses, and containing some 300 folios. A motion was now made for final proceedings against the defendant for the waste alleged to have been committed, which motion was resisted upon the ground that the proofs did not establish the fact that the defendant was guilty of the commission of waste.

D. B. Beach & C. Tucker, for the relators.

C. M. Lee & L. Farrar, for the defendant.

WELLES, J. From an attentive examination and consideration of the voluminous proofs returned by the referee, together with the defendant's answers to the interrogatories, I have come to the following conclusions of fact. 1st. That a number of years prior to the time of the commencement of the action of ejectment, the defendant took possession as owner of the premises or lot in question, which was then in a wild and uncultivated state. 2. That about the same time, he commenced clearing up and improving the same, and continued from time to time so to clear up, improve, and cultivate the said lot until the service upon him of the order of the 31st of October, 1845, restraining the commission of waste, and that since that time he has also, at various times and occasions, cut down, or caused to be cut down and taken away trees, timber and wood standing and growing on the said premises. 3. That such cutting down and taking away

of standing trees and timber has been principally, if not all, done in the regular progress of clearing and improving the lot, or in the procuring of fencing materials for the same, and that such cutting and clearing were not contrary to good husbandry. 4th. That there is left upon the lot, at least fifty acres of wood and timber land, upon which it does not appear that any trees have been cut, and which is a sufficient portion of the lot to be left for the purpose of wood and timber, and that good husbandry requires, or would admit of, the residue of the said lot to be put under cultivation. And 5th. That the action of ejectment is still pending and undetermined, and that the parties thereto respectively claim to be the owners of the lot in fee.

The question of what acts are to be deemed waste, has generally arisen between the *owner in fee* and the tenant for life or years; and they are defined to be such acts as occasion a permanent injury to the inheritance. The question in the present case arises between parties, both of whom claim to be the owners in fee. The defendant is and has been for many years in possession, claiming in his own right and in hostility to the relators.

The statute provides that "after the commencement of any action for the recovery of land or for the recovery of the possession of any land, the defendant shall not make any waste of the land in demand, pending the suit; and if such defendant shall commit waste, the court in which the suit is pending shall have power, on the application of the plaintiff, to make an order restraining the defendant from the commission of any further waste thereon." (2 R. S. 336, § 18.) The relation in which the defendant stands to the relators, who are the plaintiffs in the ejectment suit, is quite as favorable as that of the tenant to the remainder man or reversioner, for the purpose of determining what shall be considered waste.

The defendant in possession claiming title, is to be regarded the owner of the premises, against all the world, until a better title than his shall be established by a judicial determination; (*The People vs. Alberty*, 11 Wend. 160;) and if there is any difference between him and the tenant in this respect, it is in favor of the former. At any rate, the doctrine as to what shall be considered waste, should not be extended as against him, beyond what would be proper in the case of a tenant and reversioner or him in remainder. I think the rule should be the same in both cases. Looking at this case in that light, I am not prepared to say that the conduct or acts of the defendant amount to waste. A number of years before the commencement of the ejectment suit, he went into possession as owner of the premises in question, which was a lot of 145 acres, and was at that time wholly wild and uncultivated. All that he has done since, has been to improve the condition of the land, and render it more valuable, to whoever shall turn out to be the true owner.

If the cutting down of standing trees which are denominated *timber trees*, or the doing of any acts, which under other circumstances would be regarded waste, but which in such case were necessary to the regular clearing up and improvement of the lot, so as to put it in proper farming condition, according to the rules of good husbandry, are to be adjudged waste, then it is in the power of any one who might choose to commence an action of ejectment for the lot, to defeat the plans of the defendant for its improvement and cultivation, however reasonable, wise and judicious they might be. Such a rule would, in many cases, greatly impair, if not wholly destroy the value of the possession of the defendant, or of the tenant for life or years. I think the defendant should be permitted to remain in the full enjoyment of the premises, to the extent he would be, in case no adverse claim was set up,

until he shall be legally evicted, save only, that he shall not be allowed to commit a permanent or lasting injury to the inheritance. The very term waste, implies injury, or damage; and without such ingredients, it would seem there can be no waste. The conduct and acts of the defendant as established by the proof in this case do not, in my judgment, amount to such injury.

Should the defendant in his process of clearing the land in question, continue to cut down timber or other wood, so as to encroach upon what should be left and preserved as necessary to keep the fences and other erections in repair, and for fire wood for the use of the occupant, he would probably be guilty of waste, and upon application would be restrained or punished.

The motion for further proceedings against the defendant should be denied, and he should be discharged from the attachment; but as the question is of somewhat new impresson, and is now, I believe, presented in the present aspect for the first time, no costs are allowed to the defendant as against the relators.

Motion denied.

In the Supreme Court of Pennsylvania.

MARCH, 21, 1850.

DAVIS vs. FARR.

Where materials are furnished to a contractor for the joint use of two or more adjoining buildings, owned by different persons, separate liens may be filed, apportioning the proper amount due by each house.

BURNSIDE, J. Our mechanics' liens are now permanently established by Legislative enactment and judicial

decision. It has become a part of our system, and it is our duty to mould it in accordance with the object and intention of the Legislature.

In the case before us the buildings were adjoining each other. They were commenced and carried on together. Senderling had engaged with Ward and Farr, owner of the adjoining lots, to erect both houses, and find all the materials; and he purchased lumber indiscriminately from the plaintiffs for both buildings. Senderling, the contractor, being in arrears for the materials, the plaintiffs, in order to secure their debt, divided their claim and filed separate liens against each building, on account of the lumber sold to Senderling. By a writing at the foot of their account, they made the apportionment equally to each building, as follows: "The materials, &c., mentioned in the foregoing bill of particulars, were furnished for, and used about the joint construction, as well of the building mentioned in the annexed lien, as of the building adjoining to the north of the same, and of which George Ward is the owner or reputed owner, and the said John C. Senderling is the contractor, and against which said adjoining building a lien is filed to the present June Term, 1847, of this court; and the annexed lien is filed for an equally apportioned part of the above sum of \$667 36.

The lien was filed on the 1st July, 1847, to which Farr filed an affidavit of defence, alledging—1st. That the lumber was furnished by the claimants indiscriminately to both houses, and that he is advised no claim for lumber so furnished can be maintained under the existing laws of this Commonwealth. That no part of the said lumber was furnished to, or delivered upon the credit of defendant's building specifically, but was furnished, as appears, collectively to the deponent's building and that of George W. Ward. 2nd. That the claim is against two houses belonging to different and distinct individuals, to wit:—

the defendant and Ward; and the lumber having been furnished jointly and indiscriminately to the two houses, the claim cannot be maintained. 3rd. Alledging partial payments on account of the lumber, (which are not disputed,) and claiming a set off, if the lien is maintained.

A rule was obtained in April, 1848, to show cause why the *scire facias* should not be set aside, and the claim stricken from the record; which the court made absolute on the 6th May, 1848, on the ground that where materials are furnished jointly and indiscriminately for the use of two buildings owned by different parties, though the contractor be the same, no lien can be enforced.

Mechanics' liens were unknown to the common law.— They owe their existence to Legislative enactment. For more than thirty years the Legislature of Pennsylvania were trying the experiment in one place and another, before the passage of the codified act of the 16th June, 1836. Dunlop 2d Ed. 779. The first section of that act provides "that every building erected within the several counties of this Commonwealth to which the act, entitled "An act securing to mechanics and others, payment for their labor and materials, in erecting any house or other building, within the city and county of Philadelphia, passed 17th March, 1806, and the several supplements thereto, now extends, shall be subject to a lien for the payment of all the debts contracted for work done, or materials furnished, for or about the erection or construction of the same." That the debt in question was a debt contracted for and about the building of the defendants is indisputably clear. It is equally clear a joint lien could not be filed. 5 S. & R. 512, 13. It is enough if the lumber is furnished for the building. 2 S. & R. 171. But the materials must be furnished for the particular house, 16 S. & R. 56. The act of the 30th March, 1831, (Pamph. Vol. ix.—No. 28.

Laws, 243,) first provided for filing a joint claim against several adjoining houses built for the same owner, apportioning the sums due by each house. 6 S. & R. 512. Dunlop 2d Ed. 783 (note.) The case before us if not within the words, is within the spirit and object of the act of 1836. The 13th section provides "that in every case in which one claim for materials shall be filed, by the person preferring the same, against two or more buildings owned by the same person, the person filing such joint claim, shall, at the same time, designate the amount which he claims to be due to him on each of such buildings, &c.' The spirit and object of the act is, that each house should pay for its own lumber, and where the contractor is erecting two houses for different persons, unless the material man can divide his bill, which is purchased by the contractor, and file a lien for a proper portion to each building, the first section of the act is defeated. The proceeding is *in rem*, and I am unable to discern any good reason why this should not be done. "*Every building by the act is subject to a lien for the payment of all debts contracted for work done or materials furnished.*" The only argument of weight against such a course is, that the lien may be filed against one of the buildings for an improper proportion, but this can be adjusted by the jury on a trial of the *scire facias* under the direction of the court.

Mechanics' liens, under the act of 1836, and the several supplements, have become an important part of our system of jurisprudence. In the administration of the justice of the country, I am for giving these acts such a construction as will perfect the system, and carry out the object and intention of the Legislature. We think this lien was well filed and the learned court was in error in dismissing it from the record.

The judgment of the District Court is reversed, the claim restored, and a *procedendo* awarded.

District Court of the City and County of Phil'a.

BALL vs. BALL.

1. It is a fixed legal] intendment, a settled conclusion of law, that where a highway is made a boundary in a deed the land to the middle of the highway passes to the grantee.

2. The soil of such street or highway, when vacated, belongs to the grantee of the land calling for the highway as a boundary.

The opinion of the Court contains all the material facts of the case.

Per STROUD, J. It is a maxim of the common law, that the proprietors of land adjoining a highway have a fee in the soil of the highway, *usque ad medium filum vie*. Woolrich on Ways, 5. No trace of a contrary opinion or the slightest intimation of doubt on the subject, can be found, it is believed, in any English decision from the earliest period of judicial history to the present day.

Chancellor Kent, in his Commentaries, adverting to this subject, thus expresses himself: The established inference of law is, that a conveyance of land *bounded* on a public highway, carries with it the fee to the centre of the road, as a part or parcel of the grant. The idea of an intention in a grantor to withhold his interest in a road to the middle of it, after parting with all his right and title to the adjoining land is *never* to be presumed. It would be contrary to universal practice; and it was said in *Peck vs. Smith*, 11 Conn. R., 103, that there was no instance where the fee of a highway, as distinct from the adjoining land, was ever retained by the vendor. It would require an *express* declaration, or something equivalent thereto, to sustain such an inference; and it may be considered as the general rule, that a grant of land bounded upon a highway or river, carries the fee in the highway or river

to the centre of it, provided the grantor at the time owned to the centre, and there be no words or specific description to show a contrary intent. 3 Kent's Com. 443-4, 6th and last edition.

The subject is a very important one, applying, as is universally acknowledged, with the like force as well to streams of water as to common highways. Most of the decisions upon it are collected by Chancellor Kent, and are to be found in the notes to the last edition of his Commentaries. Elaborate opinions are contained in the Connecticut Reports. The result of the examination there has been the establishment of the common law principle in its whole extent. (See *Peck vs. Smith*, 1 Conn. R., 103; *Chatham vs. Brocnow*, 11 ib. 60; *Champion vs. Pendleton*, 13 ib. 23.)

A very able judgment to the same effect pronounced by the Supreme Court of Maine, in *Johnson vs. Anderson*, 18 Maine Reports, 76; and another in New York, *Luce vs. Carby*, 24 Wend. 451; seem to have brought back the law there to the standard of the common law. The boundary in this case was not a highway, but a river; but all the authorities consider them as identical as to this point.

With respect to the parts of the vacated streets which are opposite to the properties marked No. 1, 2, 3, on the plan accompanying the case stated, there is no decision, as far as we have any knowledge, which would exclude them from the operation of the maxim of the common law. They fall fully within it, and our judgment as to them is given unhesitatingly for the defendant.

We have had great difficulty, however, in regard to half of the vacated street contiguous to No. 2. The description in the deed as to this is "all that lot or piece of ground situate in Kensington district, of the Northern Liberties, beginning at the east corner of the Point-no-

Point Road and Bank street ; thence along the line of the said Bank street north 42 degrees, east 15 2-10 perches to Bank street, and thence along the line of said Bank street south 56½ degrees, west 14 2-10 perches, and north 47½ degrees, west 11 3-10 perches to the place of beginning—containing about one acre and 48 perches.”

In *Jackson vs. Hathaway*, 15 John. Rep. 447, the Supreme Court of New York decided that where one deed described the property as lying on the north side of a road, and the other property lying on the south side, that the fee of the road itself did not pass under these deeds, but remained in the grantor.

The Court held that the terms of this description necessarily excluded the road, and were equivalent to an express reservation. On the other hand, the Supreme Court of Maine, with a full knowledge of the decision in *Jackson vs. Hathaway*, came to an opposite conclusion upon this description, in the deed, beginning on the westerly side of the county road, thence running northerly touching the said westerly side of said road ; *Johnson vs. Anderson*, 18 Maine Rep. 76.

The judgment of each of these Courts was unanimous ; an elaborate opinion is given in each case. After a careful examination of both, we yield our entire concurrence with the latter.

This regards the maxim of the common law *ad medium filum via* as a fixed legal intendment, originating in considerations of policy, applicable alike to highways and water courses in the country and city.

The inconvenience of the contrary doctrine is thus stated. The effect of admitting the principle that a conveyance bounding a highway does not extend to the centre of it, would deprive the owners of farms without, and the owners of town lots within our villages and cities, of the power of improving or ornamenting that part of the way ad-

joining their lands and not used by the public, and of protecting ornamenta' trees and useful erections already existing.

The importance of upholding this maxim is shown in stronger language in *Lewis vs. Jones*, 1 Barr, 336. The Court decided there that one who deposits fence rails on a highway, commits a trespass against the owners of the soil, and enforced the propriety of the decision by the remarks : " If a wagoner were at liberty to deposit fence rails on a highway, he would be equally at liberty to deposit verdure on it, or anything else, as offensive to a family dwelling on the way side ; or he might make the spot a resting place before their doors for days or months.

These, it may be said, are considerations of a minor moment. They greatly concern, however, the comfort of the *dweller* on *the way-side*, and measurably the public at large. Stately and wide spreading trees along the highway are not only objects of beauty, which deserve to be cherished and protected, but minister much to the comfort and conveniences of life ; and yet, if the owner of the adjacent ground has no right of soil on the highway, he has no right either to plant or prohibit them.

They may be wantonly destroyed before his face, and he can neither prevent the injury nor punish it.

It is no answer to this to say, that the original grantor may interfere ; having parted with his interest in the adjoining grounds, he has little or no motive to interfere ; and among an emigrating people like ours, he may be presumed to be beyond the reach of any concern on the subject.

But we prefer the decision in *Maine* on other and different grounds. There seems to be a radical error running throughout the reasoning of the Court in *Jackson* and *Hathaway*. In this case, it is said, here is nothing in the deeds for the lots bounded *on the sides* of the Old Road,

which denotes an intention to buy or sell any land not expressly included within the courses and distances expressly defined. This is not only losing sight of the common law maxim, but it inverts the principle on which it is founded. This maxim *presumes* to use the weakest language which belongs to the subject, an intention to convey to the middle of the highway, from the *mere fact that the highway is made a boundary*.

This, as has been remarked, is a fixed legal intendment—a settled conclusion of law, call it a presumption, if you please; yet, like all other presumptions, it stands good until repelled by something unequivocally in conflict with it. Instead, therefore, of seeking in the deed for evidence of an intention to exclude the road, the burthen is upon him who would overcome the force of the maxim to show by the deed an intention to exclude it. Nothing of a slight and uncertain character can have such an effect. Those who assert an exception in so important a matter should prove its existence beyond a doubt. It is illogical to say that a fixed principle shall be overcome by a possible implication. A reservation of the soil of the road should be plainly expressed, otherwise the general rule of construction must prevail, that the grant is to be taken most strongly against the grantor. Again, it is said, in the same opinion, “the only acts imputed to the plaintiff, or those under whom he claims, are the two deeds for the parcels of land bounded on the north side and on the south side of the old road. The boundaries of these deeds do not include the space of the road, and of course the plaintiff’s title to the intervening ground remains as perfect as if no road had ever been there.”

This is in one aspect a repetition of the same erroneous reasoning; but it contains besides what appears to us equally erroneous. It is plain that it was supposed the mention of a particular side of the road as a boundary,

had a different meaning from a simple reference to the highway for the same purpose. The next paragraph conclusively shows this; it reads thus: where a farm is bounded along a highway, or upon a highway, or running to a highway, there is reason to intend that the parties meant the middle of the highway, but in this case the term necessarily *excludes the highway*.

Now it is submitted with deference that the difference in these modes of expression, is but a seeming one—that along the highway and along the side of the highway, or on the highway, or the side of the highway, &c., &c., when spoken of as a boundary, mean, and can mean, but one and the same thing. We say emphatically, when spoken of as boundaries of lands adjoining highways, because it is easy to see the difference, when such expressions are used for other purposes; as respects therefore, that part of the description in the case stated, which in No. 2 speaks of the *line* of Bank street, as a boundary, we do not perceive that this makes at all for the plaintiff. It creates no exception to the general rule.

But further, the statement in regard to the measurement of the lines, their *distances* is relied on as forming such an exception. The lines running to and from the located street, are described as measuring a certain number of perches and tenths of a perch, and in *Tyler vs. Hammond*, 11 Pick 213, and *Union Burial Ground Society vs. Robinson*, 5 Wh. 18, it was held that corresponding statements indicated by *feet and inches* conclusively overthrew the common law maxim—*ad medium filum viæ*, and left the right of soil in the highway in the grantor. Such minute description is treated in those cases as equivalent to an express reservation to the grantor.

Is this a reasonable conclusion? How does the number of feet and inches manifest such a purpose, more than the mention of larger measure, provided in each case it states

the actual distance or length of the line? Does such minute specification prove anything at all on such a subject? Does it show that the party intended to take the conveyance out of the established rule? If such intention existed is it reasonable to suppose that it would not be left to implication at all? Would it not be plainly expressed? We discover no force in such reasoning. A long line is usually measured by chains, and is designated accordingly by the perch. In town lots the lines are usually short, and when measured, it is done by feet and inches. The price is most commonly regulated by the foot. The deed conforms to the sale, and of course gives not only the feet, but parts of a foot or inches. Where more ground than is generally applicable to a single house in a city is owned by one person, who designs offering it for sale, the practice is to make out a plan upon paper, indicating the exact size of each lot; at most, in such case, the external lines of the whole ground are measured by the surveyor. The draftsman determines all else, by his scale and compass. A very precise man will give you not only inches, but fractional parts of an inch. Another will stop with inches. The closing line of unsealed lands generally, and of cultivated farms, in many instances, is not actually measured on the ground. It is never necessary, and may be properly omitted. The surveyor will delineate this most probably with more precision than those which he has measured. He will give you the exact fractions of a perch, determined by the scale. The conveyance will, of course, follow the draft. What just inference, then, can be drawn from such a procedure and such a result? But it is unnecessary to pursue the investigation further. In regard to city lots, descriptions of these minutely specified as to the length of the lines, beginning or terminating on a street, the *Union Burial Ground vs. Robinson* is a direct authority, which, under similar circumstances, we

would implicitly follow. But Judge Kennedy, by whom the opinion in this case was delivered, intimates in the fullest manner his belief, that a distinction should be made between conveyances of ground in the city and in rural districts. The defendant in error, he says, claimed to recover the land demanded, upon the ground that the owner of land through which a highway is laid out when he conveys the land afterwards, on either side thereof, making it the boundary of his grant, is presumed in law to have conveyed all his right therein to the middle of such highway, so that if he owned the land in fee and conveyed in fee metes and boundaries therein mentioned, and among other boundaries calls for the highway as one, the fee to the middle thereof will be considered as transferred.

This doubtless may be regarded as a general principal of the law in regard to conveyances of land lying in the country, and on the next page, having quoted from the opinion of Judge Wilde, in *Tyler vs. Hammond*, a remark implying that the terms of description in a deed might be such as necessarily to exclude the road, he gives to it his assent, and adds what is here said as particularly applicable, whenever the *quantity of land conveyed is small*, and its extent is described with great nicety, as in all conveyances almost of city to town lots.

The property here in dispute was at the time, when the located street was laid out, (nearly a century ago,) wholly within the county as distinguished from the city of Philadelphia. It was then without the Northern Liberties of the city. In 1826, when the partition of the Balls' estate took place, it was within the limits of the Kensington District, yet this part of the district had not then been surveyed, nor had the streets been laid out through it by public authorities. It was farm land, is conveyed by the acre, and measured and described by perches. The shortest line is much beyond the average depth of city lots.—

The vacated street does not appear to have been straight, and most certainly the *Point-no-Point* Road, which is one of the points from which the measurement is to be counted, was not the contents of the survey, is, we presume, on this very account stated to be *about* one acre and forty eight perches. No exact dimensions were supposed or intended to have been conveyed. This portion of the ground claimed is not comprehended by the ruling in the *Union Burial Ground vs. Robinson*, and the general rule of law is too well established and too valuable to be frittered away by further refinements, and therefore judgment on the whole is be entered for the defendants.

Recent English Decision.

Court of Exchequer. Sittings in Banc after Trinity Term, 1849.

REEDIE vs. THE NORTH-WESTERN RAILWAY COMPANY.—HOBBIT vs. THE SAME.

July 6. *The case of Bush vs. Steinman, (1 B. & P. 404, overruled.)*

1. The owner of *real* property is not responsible for injuries to strangers arising out of the way in which it is used by others, who are not his servants or part of his family; unless perhaps when the act done amounts to a *nuisance*, which he has not taken care to prevent, and which it was his duty to have prevented whether occasioned by his servants or others.

2. Where a company, empowered by act of parliament to make a railway, engaged with a contractor to construct a certain viaduct, parcel of it, and through the negligence of the workmen employed by the contractor, a stone fell on a man under the viaduct, and killed him.—*Held*, that the company were not liable to an action by his personal representatives, although by the terms of the deed of contract, the company reserved to themselves the right of dismissing incompetent workmen, should such be employed by the contractor.

This was an action brought by the widow and adminis-

tratrix of a man who was killed while passing under a viaduct, in course of construction, as part of a railway from Leeds to Dewsbury. The action was brought to recover compensation for the benefit of herself and her children, under the provisions of the 9 & 10 Vict. c. 93. The declaration stated that the defendants were possessed of a viaduct over the Gomersal and Dewsbury turnpike road, such viaduct being part of a railway then in course of construction between Dewsbury and Leeds; yet the defendants conducted themselves in making the said archway over the said turnpike road so negligently, that by reason thereof a large stone, parcel of the materials used in the construction of the said archway, fell on the plaintiff's husband as he was passing along the road, whereby he was killed. The defendants pleaded, first not guilty; secondly, that they were not making the said archway in manner and form, &c. Issue. The cause was tried before Cresswell, J., when a verdict was found for the plaintiff, with liberty to the defendants to enter a nonsuit in case the court should be of opinion that the action did not lie against them. The material facts in the case were these:—On the 30th June, 1845, an act of parliament, the 8 & 9 Vict. c. xxxvi. (local and personal,) intituled “The Leeds, Dewsbury, and Manchester Railway Act, 1845,” received the royal assent. By the provisions of that act, a company was incorporated in the usual way for the purpose, among other objects, of forming the railway in question. By an indenture dated the 29th September, 1846, made between the company of the one part, and Joseph Crawshaw and Richard Crawshaw of the other part, the Messrs. Crawshaw covenanted with the company that they would, in consideration of a sum of 55,000*l.* to be paid as therein mentioned, make and complete a portion of the railway described in the indenture, of the length of 3830 yards, or thereabouts, with all

excavations, embankments, bridges, tunnels, viaducts, roads, fences, and other works connected therewith, according to the specification referred to. According to the provisions of this deed, although the works were to be done by the contractors, the company had a general right of watching their progress, and if the contractor employed incompetent workmen, the company had the power of dismissing them. Under this contract Messrs. Crawshaw proceeded to execute the works, and while they were in progress, viz : on the 9th July, 1847, another act, the 10 & 11 Vict. c. clix. (local and personal,) intitled "An Act to incorporate the Huddersfield and Manchester Railway and Canal Company, and the Leeds, Dewsbury, and Manchester Railway Company, with the London and Northwestern Railway Company," received the royal assent ; whereby it was enacted, that the said Leeds, Dewsbury, and Manchester Railway, with all and singular the undertakings thereof, as well those which had been commenced as those which had not, and all the real and personal estate of the said company, should (subject to the existing debts, liabilities, and contracts of the said company) be vested in the London and Northwestern railway company, and might be lawfully executed, completed, held, and enjoyed by them in the same way as they might have been executed, completed, held, and enjoyed by the said Leeds, Dewsbury, and Manchester Railway Company if that act had not passed. After the passing of this second act, Messrs. Crawshaw continued to proceed with their works, in the course of which the accident in question took place, and which was occasioned by the negligent conduct of some of their workmen who were employed in removing a heavy stone from a traveling truck. A rule having been obtained, the case was argued at the sittings in Banc after Hilary term, on the 13th and 14th February, before Parke, Rolfe, and Platt, BB.

The case was argued and held under advisement, until after the argument of *Hobbit vs. North-western Railway company*, a case depending on similar principles.

The judgment of the Court was then delivered in both cases by

ROLFE, B.—After stating the pleadings and facts in *Reddie vs. The North-western Railway Company*, his lordship proceeded thus :—It appears to us quite clear, that after the passing of the second act the contract with *Messrs. Crawshaw* was transferred to the present defendants, so as to make them liable to the same extent precisely as the original *Leeds, Dewsbury, and Manchester company* would have been liable if the second act had not passed. But after full consideration of the subject we are of opinion that neither the defendants nor the original company were liable.

In the case of *Quarman vs. Burnett*, (6 *Mee. & W.* 499, this Court decided, (adopting the opinion of Lord Tenterden and Mr. Justice Littledale, in *Laugher vs. Pointer*, 5 *B. & C.* 457,) that the liability to make compensation for an injury arising from the neglect of a person driving a carriage, attaches only on the driver, or on the person employing him.

The liability of any one other than the party actually guilty of any wrongful act, proceeds on the maxim, "*Qui facit per alium facit per se.*" The party employing has the selection of the party employed, and it is reasonable that he who has made choice of an unskilful or careless person to execute his orders, should be responsible for any injury resulting from the want of skill or want of care of the person employed; but neither the principle of the rule, nor the rule itself, can apply to a case where the party sought to be charged does not stand in the character of employer to the party by whose negligent act the injury had been occasioned. The doctrine of *Quarman*

vs. Burnett has since been acted on in this court in the case of Rapson vs. Cubitt, (9 Mee. & W. 710,) and in the court of Queen's Bench in Milligan vs. Wedge, (12 Adol. & Ell. 737,) and again in Allen vs. Hayward, (7 Q. B. 960.)

By these authorities we must consider the law to have been settled; and the only question is whether the law so settled is applicable to the facts of this case.

To shew it was not, it was argued by the counsel for the plaintiff, that there is a recognized distinction on this subject, between injuries arising from the careless and unskilful management of an animal, or other personal chattel, and an injury resulting from the negligent management of fixed real property;—in the latter case it was contended that the owner is responsible for all injuries to passers-by or others, however they may have been occasioned; and here it was said that the defendants were at the time of the accident the owners of the railway and so are the parties responsible.

This distinction as to fixed real property, is adverted to by Mr. Chief Justice Littledale in his very able judgment, in Laughher vs. Pointer, (p. 560,) and it is also noticed in the judgment of this court in Quarman vs. Burnett. But in neither of those cases was it necessary to decide whether such a distinction did or did not exist. The case of Bush vs. Steinman, (1 B. & P. 404,) where the owner of a house was held liable for the act of a servant of a subcontractor, acting under a builder employed by the owner was a case of *fixed* real property. That case was strongly pressed in argument in support of the liability of the defendant both in Laughher vs. Pointer and Quarman vs. Burnett; and as the circumstances of those two cases were such as not to make it necessary to overrule Bush vs. Steinman, if any distinction in point of law did exist in cases like the present, between fixed property and ordi-

nary movable chattels, it was right to notice the point.— But on full consideration we have come to the conclusion that there is no such distinction, unless perhaps in cases where the act complained of is such as to amount to a nuisance, and in fact that according to the modern decisions, *Bush vs. Steinman*, must be taken not to be law, or at all events that it cannot be supported on the ground on which the judgment of the Court proceeded. It is not necessary to decide whether in any case the owner of real property, such as land or houses, may be responsible for nuisances occasioned by the mode in which his property is used by others not standing in the relation of servants to him, or part of his family. It may be that in some cases he is so responsible. But then his liability must be founded on the principle that he has not taken due care to prevent the doing of acts which it was his duty to prevent, whether done by his servants or others.

If, for instance, a person occupying a house or a field should permit another to carry on there a noxious trade so as to be a nuisance to his neighbors, it may be that he would be responsible though the acts complained of were neither his acts nor the acts of his servants; he would have violated the rule of law, "*Sic utere tuo ut alienum non lædas.*" This is referred to by Mr. Justice Cresswell, in delivering the judgment of the Court of Common Pleas, in *Rich vs. Basterfield*, (4 C. B. 802,) as the principle on which parties possessed of fixed property are responsible for acts of nuisance occasioned by the mode in which the property is enjoyed. And possibly on some such principle as this the case of *Bush vs. Steinman*, may be supported. It may happen also, that the owner of movable property might be responsible for a nuisance in the mode of enjoying it; as, if he kept a carriage laden with noxious substances in the public street, to the annoyance of passengers. But certainly the doctrine cannot be applied

to the case now before us. The wrongful act here could not in any possible sense be treated as a nuisance—it was one single act of negligence—and in such a case there is no principle for making any distinction by reason of the negligence having arisen in reference to real and not to personal property. If the defendants had employed a contractor carrying on an independent business to repair their engines or carriages, and the contractor's workman had negligently caused a heavy piece of iron to fall on a bystander, it would appear a strange doctrine to hold that the defendants were responsible. Mr. Justice Littledale, in his very able judgment in *Laugher vs. Pointer*, observed, (p. 559,) that the law does not recognize a several liability in two principals who are unconnected—if they are jointly liable you may sue either, but you cannot have two separately liable. This doctrine is one of general application irrespective of the nature of the employment; and applying the principle to the present case, it would be impossible to hold the present defendants liable without at the same time deciding that the contractors are not liable, which it would be impossible to be contended.

It remains only to be observed, that in none of the modern cases has the alleged distinction between real and personal property been admitted. In *Milligan vs. Wedge*, Lord Denman expresses doubt as to the existence of such a distinction in any case, and in the more recent case of *Allen vs. Hayward*, the judgment of the Court proceeded expressly on the ground that the contractor in a case like the present is the only party responsible. This last case so closely resembles the present, that even if we had not considered the decision right we should probably have felt bound by it. But we see no reason to doubt its perfect correctness. It seems to follow as a necessary corollary from the principles of the preceding cases, and entirely to govern this.

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Our attention was directed during the argument, to the provisions of the contract whereby the defendants had the power of insisting on the removal of careless or incompetent workmen; and so it was contended they must be responsible for their non-removal. But this power of removal does not seem to us to vary the case. The workman is still the servant of the contractor only, and the fact that the defendants might have insisted on his removal if they thought him careless or unskilful did not make him their servant. In *Quarman vs. Burnett*, the particular driver was selected by the defendants; but this was not to affect the liability of the driver's master, or to create any responsibility in the defendants, and the same principle applies here.

On these grounds we are of opinion that this rule must be made absolute; and the same will also be the result of *Hobbit vs. The North-western Railway Company*.

PARKE, B.—Having an interest in the North-western Railway Company, I decline to take any part in these cases unless the counsel allow me. If they do, I must say that I concur in the judgment which has been delivered.

Rule absolute.

Fugitives from Labor.—The bill repealing the act of 3d March, 1847, which prohibited State Officers from taking jurisdiction under the act of Congress of 1793, recently passed the House of Representatives of Pennsylvania by a large vote. In the Senate, it was referred to a committee of which Mr. Matthias, of Philadelphia, was chairman. That committee has reported against the repealing act. Its fate, during the present session, is therefore uncertain. As the subject will, in all probability, be agitated until the question shall be settled, it may be interesting to state some facts in connection with the origin of the bill. Early in the session,

a distinguished member of the House, from Luzerne county—a gentleman of undoubted patriotism and enlarged experience in public affairs, in view of the excited condition of the public mind, growing out of the slave question, offered a resolution for the appointment of a committee “to inquire into the existing federal relations of Pennsylvania as a member of the Union.” The resolution was adopted, and the mover, Mr. BEAUMONT, subsequently made an able report in which, among other questions, he discussed the provision of the Federal Constitution relative to the surrender of fugitives from labor. The report declares that the clause referred to is “binding on the STATES and the PEOPLE of the States”—that “in the opinion of the committee it has been infringed, and its solemn injunction disregarded by more than one member of the confederacy” “that this cause of complaint should be removed” and “that the STATES, as parties to this Union, should fulfil in good faith, not attempt to defeat, the stipulations entered into in the Constitution.”

This of course referred pointedly to the act of 3d March, 1847, withdrawing the aid of State legislation and State authority to enforce the federal constitution in the particular referred to. Dr. WM. A. SMITH, from Cambria county, upon consultation, we understand, with the author of the report, read the bill in his place repealing the act of 1847. This bill was referred to the Judiciary Committee of the House who unanimously reported in favor of its passage, as stated in our last number.

In connexion with this subject we subjoin a highly interesting decision recently made under the act of 3d March, 1847, by Judge WATTS, President of the Court of Quarter Sessions of Cumberland county. We express no opinion upon the questions decided. It is proper, however, to bear in mind that the peculiar circumstances of the case were not calculated to secure a consideration entirely free from the influences of human sympathy. In the case of *Prigg vs. Pennsylvania*, the child of a slave although begotten and born in Pennsylvania, was carried off as a slave by the owner of the mother, and, so far as we understand the facts of the case, the master was not held to be guilty of kidnapping. The special verdict finds the fact as stated, but it does not appear from the report of the case (16 Peters 539,) that the indictment embraced the case of the child.

Court of Quarter Sessions of Cumberland County--Pa.

COMMONWEALTH vs MARTIN C. AULD—INDICTMENT FOR KIDNAPPING.

1. The act of Pennsylvania of 3rd March, 1847, so far as it prohibits and pun

ishes the carrying "*free negroes or mulattoes*" out of the State is constitutional, notwithstanding that such persons may be claimed as slaves.

2. The rule of "*partus sequitur ventrem*" does not apply to the case of a negro child born in Pennsylvania, although born of a mother who was, at the time, a fugitive slave.

3. In the free State of Pennsylvania a slave cannot be born.

The following report of the case is taken from the Weekly News of the 18th April, 1850.

The leading facts of the case, which the Commonwealth and Defendant's counsel admitted, were, that about nineteen years ago, Dr. Ridgely, of the State of Maryland, was the owner of a female negro slave named Betsy, who then escaped into the State of Pennsylvania, and was not retaken. Six months after she came to Pennsylvania she was delivered of a male child, which she called Alexander; she was afterwards married and had several children. The defendant, learning these facts, wrote to Dr. Ridgely informing him of them, and he sent his two sons here to reclaim his property. When they came here, they employed the defendant and an innkeeper by the name of Pile, to aid them to capture and carry away the boy Alexander, then between seventeen and eighteen years of age. They remained several days, during which time they were at different points in the neighborhood devising their plan of operation. The boy had previously been in the employment of Pile as an ostler, but had been absent a few days; he was sent for and brought back, and was engaged in taking care of the horses of the persons who sought to take him. During the day and evening several times they induced the boy to drink brandy, into which they had put laudanum; but, as it seemed by the proof, it had not the desired effect. About 11 o'clock in the night the horses were put into the carriage, and the boy was induced by the offer of money to get into the carriage to ride a short distance, about half a mile, for the purpose of pointing out a certain road,

which they said they wished to take. **Martin C. Auld** got into the carriage with him, and it was driven off. After they had passed the point mentioned, the boy discovered their object and attempted to make a noise, which the defendant prevented by thrusting his handkerchief into his mouth. The boy was then carried out of Pennsylvania, and was subsequently sold by his alleged owners in Baltimore, as a slave for life. These are the material facts of the case, which were either admitted or clearly and satisfactorily proved. The indictment was founded upon the Act of Assembly of the 3d of March, 1847.

Messrs. Smith, Attorney General, and **Gaullagher** conducted the prosecution.

Messrs. Miller and **Biddle**, for defendant.

The Court directed the defendant to enter into recognizance for his appearance at the April Term next, to abide their sentence upon such judgment as they should then pronounce.

Now, April, 1850, the Court delivered the following opinion :

WATTS, P.—On the trial of this cause we felt our indebtedness to the counsel of the Commonwealth and of the defendant, for the learned and lucid arguments which enabled us then to pronounce so decided an opinion to the jury, without any previous investigation of our own. The laudable zeal which has induced the defendant's counsel since, so industriously and elaborately to investigate the subject for our benefit, claims our kindest consideration, and certainly opens our minds to a generous disposition to hear with favor and respect, and to pronounce the judgment of the law without bias.

The argument for the defendant resolves itself into three grounds :—

1st. The Court has no jurisdiction to try the questions raised by the indictment, because it involves the question of slavery.

2nd. The act of 3d of March, 1847, which defines the offence with which the defendant is charged, is unconstitutional, because it affects the right to slave property.

3rd. That Alexander Burns named in the indictment as the person kidnapped was not a free negro, but a slave.

The reasons urged in support of each of the first two positions of the defendant's counsel are substantially the same, and we may therefore consider them together. The act of Assembly upon which the indictment is framed is as follows :

“ That if any person shall by force or violence take and carry away, or cause to be taken and carried away, and shall by fraud or false pretence entice, or cause to be enticed, or shall attempt so to take, carry away, or entice any free negro or mulatto, from any part or parts of this Commonwealth to any other place or places whatsoever, out of this Commonwealth, with a design and intention of selling and disposing of, or causing to be sold, or keeping and detaining, or causing to be kept and detained, such free negro or mulatto as a slave or servant for life or for any term whatsoever, every such person or persons, his or her aiders and abettors shall be deemed guilty of a high misdemeanor, and on conviction thereof in any Court of Quarter Sessions of this Commonwealth, having competent jurisdiction, shall be sentenced to pay, at the discretion of the Court passing the sentence, any sum not less than five hundred nor more than two thousand dollars, &c., and moreover, shall be sentenced to undergo a punishment, by solitary confinement in the proper penitentiary, at hard labor, for a period not less than five years, nor exceeding twelve years.”

While with judicial and cordial respect we concede the principle settled by the Supreme Court of the United States in the case of *Prigg vs. The Commonwealth of Penn'a*—that the power to legislate on the subject of fu-

gitive slaves belongs exclusively to Congress—and we may agree, for the sake of the illustration, that our State Courts will not entertain jurisdiction of any question arising under the Constitution and Laws of the United States respecting fugitive slaves; yet we cannot perceive, why the Legislature of Pennsylvania may not pass a law to protect the free negroes and mulattoes within her own borders, by punishing the crime of Kidnapping. Can it be said, with the force of argument, that, because it may be *alleged* on the trial of an indictment under the law, that the person violently carried away was a slave, the jurisdiction and power of the Court to enquire into the truth of the fact must cease?—or because, by chance, the owner of a fugitive slave may be improperly indicted for peaceably taking and carrying away his own property, therefore, the act of Assembly intended to punish the taking and carrying away a free negro or mulatto, is unconstitutional?

If these positions could be maintained, then we must submit to the consequence, and that which we all freely admit to be a crime of a high grade, deserving the severest penalties, would be unpunished for want of Constitutional power in the Legislature to make it penal, or in the Courts to try the fact. This act of Assembly, (we speak only of the first section,) simply provides, that any person who shall violently and forcibly take and carry away a *free negro or mulatto* out of this State, to any other place, shall be guilty of Kidnapping; and differs essentially from the act of 1826, which was intended to punish as a criminal offence, the act of seizing and removing a *slave* by his *master*, without conforming to certain prerequisites which that act provided for, and which was declared to be in violation of the 2nd sec. 4th art. of the Constitution of the United States. It is argued, “that we are taking upon ourselves to determine, by virtue of the act of Assembly

1847, whether Mr. Ridgely was entitled to the service of his slave." No, this was not the question tried. The indictment charged the defendant with the crime of Kidnapping; to this indictment he pleaded "not guilty," and predicated his defence upon two general grounds:—that the fact of his participation in the offence was not proved, and that the person taken and carried away was not a free negro or mulatto. To this issue neither the owner of the slave nor the slave himself was a party, nor could the rights of either be in any degree affected by the judgment which we may render. Our inquiry into the freedom or slavery of Alexander Burns, is a collateral one, and only made to enable us to determine as to the guilt or innocence of our own citizen, charged with an offence under our own law.

But it is argued that the whole act of the 3d of March, 1847, is unconstitutional and void, because it is opposed to the provisions of the Constitution and the act of Congress of the 12th of Feb., 1793. If we were obliged upon principle to consider the eighth section of this act as comprising one inseparable and entire law, we would not hesitate a moment to pronounce the whole act unconstitutional and void in its object and spirit; but we are not at liberty so to do; for nothing is better settled than that the validity of one section of an act of Assembly is in no degree dependent upon another. The practical Legislation of the day, which combines subjects not even having the claim of kindred, is a striking illustration of the necessity of this rule. It is sufficient for us that the first section of the act, with which alone we have to do, is constitutional and wholly unexceptionable.

The only question which remains to be considered is, was Alexander Burns a free negro or mulatto? We cannot entertain a reasonable doubt on this subject.

Whilst we recognize to the fullest extent the argument

predicated upon rules of law which prevail in States where slavery is lawful—that there, *partus sequitur ventrem* is a maxim of universal application, as well to the slave, as the unintelligent animal. But, *ratione cessante cessat ipsa lex* : in the free State of Pennsylvania a slave can not be born; for by the 3d section of the act of 1st of March, 1780, it is provided that “ All persons, as well negroes as mulattoes who shall be *born within this State*, shall not be deemed and considered as servants for life or slaves ; and all servitude for life or slavery of children in consequence of the slavery of their mothers, in the case of all children *born within this State* from and after the passing of this act aforesaid, shall be and hereby is utterly taken away, extinguished and forever abolished.” However strongly we may be disposed to recognize the rights of slave owners in our sister States, we cannot for a moment question the competency of our Legislature to declare, that all children *born within this State* shall be free. The Constitution of the United States makes no other provisions than “ persons held to service or labor in one State, under the laws thereof, escaping into another State, shall not be discharged from such service, but shall be delivered up.” It cannot be successfully argued that Alexander Burns, who was not in existence when his mother ran away, had escaped or was a fugitive. For if it were even possible to give an equitable construction to the Constitution, we could not exercise it in a case like this, where the person was born within this State, and continued to reside here, in the undisturbed enjoyment of his freedom, for a period of more than eighteen years. We are, for these reasons, irresistibly led to the conclusion that Alexander Burns was a freeman ; and that judgment be entered upon the verdict that Martin C. Auld, the defendant, is *guilty* in manner and form as he stands indicted.

CONSTITUTION AND ADMINISTRATION OF JUSTICE IN
NORWAY

Mr. John S. Maxwell, has furnished an interesting work called "The Czar, his Court and People," &c. from which we make the following extracts. Of course we have no pettifoggers in this country. Wherever they exist they are in truth the "banditti of the Bar."

THE CONSTITUTION OF NORWAY.

"The Storthing, or Congress, is elected every three years—it assembles *suo jure*, and not by the royal proclamation. It has the initiative in the making of laws, regulates the currency, taxes, revenues, and expenditures of government, and exercises all the powers necessary for a complete administration of the affairs of the country.—The Storthing or Congress, immediately after it assembles, elects a President and chooses from among its members one-fourth of the whole body to constitute an upper house or Senate, which is invested with powers much like those of the Senate of the United States, and exercises judicial functions in cases of impeachment. The remainder constitute the lower house or chamber of deputies, corresponding to the House of Representatives in the United States. A measure proposed and passed in the lower house, is sent to the Senate for confirmation or amendment, as in other bodies thus constituted. After it has received the sanction of both houses, it requires the assent of the king to become lawful. If the royal assent is refused, the next Congress may advocate and confirm the same measure, and the king may again refuse his assent;—but if a third Congress shall again pass it, then it becomes a law, the veto of his majesty to the contrary notwithstanding. Every native of Norway, who is of age, who is a tax payer, or who is the owner of a freehold worth one hundred and fifty dollars, and who is not a

courtier or office-holder, or disabled by reason of mental infirmity, or incapacitated because of a conviction or imprisonment for an offence against the welfare of society, is entitled to elect and to be elected. The country is divided into election districts, and the electors are registered in each district. Every three years the voters assemble in some convenient place, and out of every hundred a delegate is chosen to attend the convention of the delegates of the district, who choose from among themselves as many members as the district may be entitled to send to the Storting. The working of this constitution has been all that could be desired. Beneath its influence, the progress and improvement of the country, and the amelioration of the condition of the people, is beyond all precedent in European history."

Administration of Justice among the Norsemen.

"The administration of the civil law in Norway is most admirably contrived. In every school district, the freeholders elect a Justice of the Court of Reconciliation.—Every law suit must first be brought before this justice, and by the parties in person, as no lawyer or attorney is allowed to practise in this court. The parties appear in person, and state their mutual complaints and grievances at length, and the justice carefully notes down all the facts and statements of the plaintiff and defendant, and after due consideration, endeavors to arrange the matter, and proposes for this purpose, what he considers to be perfectly just and fair in the premises. If his judgment is accepted, it is immediately entered in the court above, which is a Court of Record; and if it is appealed from, the case goes up to the District Court, upon the evidence already taken in writing, by the Justice of the Court of Reconciliation. No other evidence is admitted. If the terms proposed by the justice are pronounced to be just and reasonable, the party appealing has to pay the costs

and charges of the appeal. This system of minor courts prevents a deal of unnecessary, expensive, and vexatious litigation. The case goes up from court to court upon the same evidence, and the legal argument rests upon the same facts, without trick or circumlocution of any kind from either party. There is no chance for pettifoggers, —the banditti of the bar. Poor, or rich, or stupid clients cannot be deluded, nor judge or jury mystified by the skill of sharp practitioners in the courts of law in Norway.— More than two-thirds of the suits commenced are settled in the Court of Reconciliation, and of the remaining third not so settled, not more than one-tenth are ever carried up.

“ The judges of the Norwegian courts are responsible for errors of judgment, delay, ignorance, carelessness, partiality, or prejudice. They may be summoned, accused, and tried in the Superior Court, and if convicted, are liable in damages to the party injured. There are, therefore, very few unworthy lawyers in the Norwegian courts. The bench and the bar are distinguished for integrity and learning. They have great influence in the community, and the country appreciates the many benefits which have resulted from their virtue and their wisdom.”

New Publication.

BINNS' JUSTICE OR MAGISTRATES DAILY COMPANION. A Treatise on the Office and Duties of Aldermen and Justices of the Peace, in the Commonwealth of Pennsylvania, including all the required forms of process and Docket-Entries, and embodying not only whatever may be deemed valuable to Justices of the Peace, but to Landlords, Tenants and general Agents; and making this volume what it purports to be, a safe legal guide for business men. By John Binns, late Alderman of Walnut Ward, in the city of Philadelphia. The third edition; revised, corrected, and greatly enlarged. By Frederick C. Brightly, Esq., of the Philadelphia Bar; author of "A Treatise on the Law of Costs. Philadelphia: James Kay, jr., & Brother. 193 Market street, Law Book sellers and publishers. 1850.

We are glad to see a new edition of this useful book edited by our friend F. C. Brightley, Esq. The reputation of the book is so well established that any commendation of ours would add nothing to it. It gives the fruits of experience and learning, and cannot fail to be of great value to every Magistrate in the State, as a compendious yet sufficiently full treatise upon, and repository of legal principles to which he may readily resort. Upon an examination of the third edition, and a comparison with the former one, we find the following entirely new titles: Actions against Justices, Attachment page 109, Attachment in Execution, Bribery, Conspiracy, Duelling, Factories, Fixtures, Fugitives from Justice, Homicide, Limited Partnership, Purchasers at Sheriff Sales, Religious Societies, Search Warrants, Seduction, Trade Marks. The title "Appeal," has been re-written. The following titles are extensively altered and enlarged: Abatement, Apprentices, Bills of Exchange, Certiorari, Constables, Drunkenness, Elections, Evidence, Execution, False Pretences, Fornication and Bastardy, Freeholder, Horse Racing, Justices of the Peace, Landlord and Tenant, Limitation, Malicious Mischief, Marriage, Promissory Notes and Vagrants. Mr. Brightley's additions and alterations have given the book a new and increased value. The accurate and scientific manner in which the authorities and statutes are collected, cited, arranged and applied will command the attention of the profession and be useful to the lawyer as well as the magistrate. We commend the volume as an indispensable appendage to every Magistrate's office.

Medical Jurisprudence.

The Principles of the Chrono-thermal System of Medicine, with the fallacies of the Faculty. By Samuel Dickson, M. D., of London;—with an introduction and notes by William Turner, M. D., of N. Y. This is the 13th edition of a work designed to prove “the unity or identity of all morbid action, and the unity and identity of the source of power of the various agencies by which disease of every kind may be caused or cured.” In administering the remedies the only agents which this system rejects are “the leech, the bleeding lancet and the cupping instrument.” We are not disposed to find fault with so much of any system which shall restrict the use of the lancet to cases clearly indicating that as the only appropriate remedy.

Dr. John Brown, in 1780, published his Brunonian System of Medicine. It is now more than 30 years since we perused the “*Elementa Medicine Brunonis*,” but from our recollection of that work, the new book of Dr. Dickson appears to be in part a superstructure erected upon a portion of the foundation stones of Dr. Brown. According to the system of Dr. Dickson, the type of all disease is ‘fever and ague;’ and the remedies are warmth or cordials in the cold stage, and in the hot stage a reduction of the temperature by cold affusion and fresh air, or for the same purpose emetics, purgatives, or both in combination. We would thank one of our medical friends for a brief article pointing out the differences between this system and the *sthenic* and *asthenic diseases* of Dr. Brown, with his *anti-phlogistic* and *phlogistic* remedies.

[*Ed. Am. Law Jour.*

Kidnapping Case.—This was an indictment pending against Jonathan Little and others, in Huntingdon county, Penn’a., charging them with Kidnapping a negro named Finley. Counsel attended, employed by the Governor of Maryland, with the necessary evidence to show that the negro Finley was a slave in Maryland, and that Mr. Little had authority from his master to take him. Upon these grounds the prosecution was abandoned by the prosecuting officers, without a trial.

☞ Chancellor Walworth, of New York, is a descendant of Mary Chilton, the first female who leaped from the boats of the Mayflower, upon Plymouth Rock.

Law Miscellany.

LEGAL GOSSIP.

The following anecdote is related by a pupil of the late Professor Bell, of Scotland, as having happened one day at the Lecture. "One of my class fellows was a young man from Glasgow, who was particularly distinguished by his industry and close application to his studies; nor was he at all times content with the information the Professor gave him, but would consult every authority until he had satisfied his mind, not unfrequently arriving at a conclusion different from his learned preceptor's dictum. Setting beside me one day, he was suddenly called up for examination; we had not the least idea of what the examination would be about, and he was doubtful of the appearance he would make. The first question or two he answered well enough, until Professor Bell put one to him respecting the doctrine of law relating to the ratification of deeds by a wife. My friend answered distinctly and most confidently, but the professor was dissatisfied. "No, sir, that is not the proper answer." To my utter astonishment my zealous friend unblushingly rejoined, "I am aware, sir, that a different rule is laid down in your Principles, but you there refer to Erskine's Institute, book —, title —, section —. Now, sir, I turned up the passage and I found that *Mr. Erskine says the very reverse*, and according to him (with significant emphasis) my answer was quite right!" I need not attempt to describe the effect of this scene in the class. We were horrified by the audacity of my friend, who was by no means conspicuous for anything betokening a forward disposition. The Professor was aghast; jealous of his legal opinion at all times, to be thus bearded was too much; however, after recovering his breath, he said: "Does Mr. Erskine say so, sir!" "He certainly does," was the unhesitating response. "Then, sir," replied the author of the Commentaries on the Law of Scotland, "Mr. Erskine is **WRONG**."

[Lond. Law Mag.]

In the Supreme Court of the United States, the following rule was adopted on the 24th April, 1850:—

Rule No. 58. "Ordered, that twelve printed copies of the abstract points and authorities required by the fifty-third rule, be filed with the clerk, three days before the case is called for argument; nine of these copies for the Court—one for the reporter—one for the opposing counsel—and the remaining one to be retained by the clerk. This order to take effect on the first of May next."

ANECDOTE OF LORD ELDON AND SIR GEORGE ROSE.

Many were the squibs in prose and verse of which the Fabians of Chancellors was the subject. To one by Sir George Rose, a happy retort was made by Lord Eldon :

My most valued and witty friend, Sir George Rose, when at the bar, having the note-book of the regular reporter of Lord Eldon's decisions put into his hand, with a request that he would take a note for him of any decision which should be given, entered in it the following lines, as a full record of all that was material which had occurred during the day :

Mr. Leach
Made a speech—
Angry, neat, but wrong :
Mr. Hart,
On the other part,
Was heavy, dull and long ;
Mr. Parker
Made the case darker,
Which was dark enough without :
Mr. Cooke
Cited his book,
And the Chancellor said—" I DOUBT."

This *jeu d'esprit*, flying about Westminster Hall, reached the Chancellor, who was very much amused with it, notwithstanding the allusion to his doubting propensity. Soon after, Mr. Rose having to argue before him a very untenable proposition, he gave his opinion very gravely, and with infinite grace and felicity, thus concluded : " For these reasons, the judgment must be against your clients : and here, Mr. Rose, the Chancellor *does not doubt* "

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AMERICAN LAW JOURNAL.

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JUNE, 1850.  
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CHARLES WALLACE BROOKE, ESQ.

Charles Wallace Brooke was the son of Robert Brooke, and the grandson of Andrew Porter. His father's profession was that of a Surveyor, and the traces of his labors are contained in the history of many of our most important land titles in Philadelphia. Of his children, two were bred to the profession of the law. Robert M. Brooke, the elder of the two, sustained for many years a commanding position at the Northampton bar, and earned a high reputation for learning, ability and wit. Of the other, we are to speak more at length.

The latter commenced the study of the law at an early age in the office of George B. Porter, Esq. of Lancaster. Mr. Porter was then actively engaged in those political

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pursuits, which resulted in his removal to Michigan, under an appointment as Governor of that Territory. After spending some months in Lancaster, Mr. B. removed to Philadelphia, and entered as a student the office of William Rawle, Esq., under whose care he spent several years in preparation for his profession, and to whose judicious counsel, he traced much of his success in life.

On the 21st of June, 1834, he was admitted to the bar, and entered on the practice of his profession, at Norristown, Pa. To the practical lawyer, it will be sufficient to observe, that with few advantages except those of an intellectual character, he secured in the five years of his residence there, a large share of professional business, and established a character for promptness, accuracy and ability. The records which he has left of his business show that up to the period of his removal from the county, it was steadily increasing.

In January, 1839, he received the appointment of Deputy Attorney General, for the city and county of Philadelphia, in conjunction with George W. Barton, Esq.; and on Mr. Barton's elevation to the Bench, he became the sole representative of the Attorney General for this county.

The severe character of the duties of this office is generally known; and it is not improbable that he laid at this period, the foundation of that painful malady with which he struggled during the greater portion of his subsequent life. The records of the Court show that during the time for which he held the office, as many as thirty cases were sometimes determined in a single day. Occasionally the Court were occupied with cases of the highest importance and popular interest. The prosecution of the celebrated Dr. Eldridge may be instanced. In this case, which engaged the attention of the Court for nine successive weeks, the strength of the bar was arrayed for the prose-

cution, and the defence is acknowledged to have been conducted with a masterly ability. The speech of Mr. Brooke, on the part of the Commonwealth, which occupied more than a day in its delivery, established on solid basis, his reputation as a criminal lawyer.

In September, 1841, Mr. B. was appointed Solicitor of the Trustees of the Bank of the United States, under the third assignment, and held the office during the remainder of his life. The magnitude of the trust which this assignment created,—arising out of the assets it conveyed, amounting in all to over \$14,000,000,—the condition and residence of the debtors, and the unsettled state of their accounts, need not be stated. In what manner his duties as the legal adviser of the Trustees were discharged, may be judged by the resolutions adopted on receiving intelligence of his death, in which they expressed their opinion of him as “an able counsellor, a ready, judicious and safe guide, whose integrity of purpose and uprightness of action gained their cordial esteem and entire confidence.”

It may be added, that in the written opinions delivered by him, on the various subjects arising out of the trust, and comprising a volume of large size, no error has become apparent—nothing has been reversed by senior counsel subsequently consulted,—no judicial decision has pointed out an impropriety in the course recommended,—and those who followed the advice have had no reason to regret it, or to wish they had done otherwise.

From the numerous civil causes in which he was concerned on behalf of the Trustees of the Bank, that of the Insurance Bank of Columbus, against the Bank of the United States, tried in the District Court of Philadelphia, in 1847, may be selected. The preparation and trial of this cause, which involved over \$350,000, afforded a display of the highest professional ability. The most emi-

ment counsel at our own bar, and others from a distance were retained. A large part of the labor of the defence, necessarily fell to the junior counsel. It is moderate praise to say, that the duties which thus devolved on him, were, in the estimation both of his clients and colleagues, performed in such a manner as to reflect the highest credit on his capacity for thought and labor.

The leading qualities of his intellect are easily enumerated. The more prominent were quickness and clearness. He could take up a mass of complicated facts, involving sums, dates, accounts, correspondence and conversations, and in probably as short a space of time as any man he has left behind him, he could present a statement of the whole so clearly that it was not only easy to comprehend it, but impossible to misunderstand it, and in so pure and unostentatious a manner, that the subject must indeed have been destitute of interest if it did not impart pleasure to the hearer. "Until I heard him open that cause," said one of his colleagues in the case last adverted to, "I never knew what was in him;" and no man could have opened it successfully, who did not possess in an eminent degree, the intellectual characteristics which have been ascribed to him.

His decision of character was not less remarkable.—When his judgment on any subject had become mature, you might with the utmost confidence rely on finding his mind at any other time, in precisely the same state, or to hear some sound reason for a change. He had never learned to waiver. He either gave the subject no attention as worthless, or addressed himself to it with diligence—drew his conclusion,—dismissed the process,—and adopted the result as a fixed fact, about which no doubt was ever after tolerable.

He was a man of indomitable energy. In the course which he proposed to himself he saw no obstacle. A fact

which occurred during his last illness, may be adduced in illustration. He had been confined to his room for several days and had become so much reduced by suffering, that his attendants supposed him unable to walk without assistance. Suddenly recollecting some business which he supposed neglected, he arose against all remonstrance—proceeded alone to the Common Pleas,—made a motion to the Court,—gave a memorandum to the Prothonotary,—exchanged salutations pleasantly with his friends, and returned as he went. His debility was only apparent when the object had been accomplished. This happened on the 20th of September, 1849. He died on the 22d of October, in his 37th year, from an affection of the heart.

To these more hardy qualities, he united others, not always associated with them. He was a cheerful companion. He did not recognize the obligation under which men seem occasionally to be borne, to say something in opposition to whatever any other man may choose to advance. He was a good listener, and indeed had cultivated, to a remarkable degree, the power of remaining silent in the society of others,—an accomplishment quite as rare as that of the highest eloquence. His calmness and self possession were generally remarked.

In what has been observed of his intellect, it is not intended to say he had given evidence of the highest endowments. It is believed, and there is sound reason for the belief, that if his life had been spared, he would at one day have occupied a place in the front rank of the profession.

His legal reading was varied and extensive. Whatever he understood, he understood thoroughly. Whatever he did, he did well. His facility in the transaction of business, was unexcelled. As a speaker, his diction was graceful,—more rapid perhaps than was agreeable,—but

in general impressive and appropriate. On the whole it were difficult to find an array of powers, giving brighter promise of success.

In general literature his taste was discriminating and refined. He read the English classics with avidity. Of metaphysical pursuits he was extremely fond. He had studied with care the *Analogy* of Bishop Butler, and delighted to discuss with his associates, the opinions of that wonderful thinker.

As a writer, he laid no claim to the highest excellence. The circumstances of his youth had not favored the cultivation of this power ; subsequent efforts were intended mainly as a relief to professional labor. Occasional literary performances, however, show him to have been by no means deficient in this department. We turn over, as we write, the manuscript of several addresses delivered before different literary societies, which, if published, would have added to his reputation. We notice particularly, one entitled the "*Philosophy of History*," which bears the marks of elegance and ease ; but our limits permit no more extended reference.

Of the faults of Mr. Brooke, whatever they were, it is not our purpose to speak. Jurisdiction over these, as over our own, belongs to a tribunal, competent to decide upon them, by a justice so exact, and a mercy so tender, as to leave nothing but acquiescence.

P.

The Contract of Endorsement.

This is the title given to a collection of articles originally published in the *New York Legal Observer*, and now re-published by Messrs. Derby, Miller & Co., of Auburn, N. Y. The subject in relation to which they treat, is one

of general interest, and when taken in connection with the fact, that they are a review of a decision lately made by the highest Court of that State, will cause them and the decision to be read with an attention which otherwise they might not have attracted. The main drift of the articles is to show that the New York Court of Appeals, in passing on the sufficiency of a notice of protest, should have decided solely the legal proposition, whether the note was or was not correctly described in the notice, and not what information it conveyed when received to the mind of the endorser. That the real question before the Court was, *what had the holder done, and not how the endorser felt.*

There is an expression in the opinion under review well calculated to attract the attention of the general reader, and cannot escape the observation of the members of the legal profession. It is as follows: "But it is contended that the notice merely informed the defendants of the non-payment of a note drawn and endorsed respectively by the defendants for \$300, and not a note for \$600 endorsed by the defendants *jointly*. Concede that such variance or misdescription exists. It is well settled in accordance with good sense, that an immaterial variance in the notice will not vitiate it." The point decided is that a variance of one half in the amount of the contract, and the number of endorsers, is an immaterial variance. Suppose the variance had been more or less than one half, would it have been immaterial? Suppose the notice had informed the defendants of the non-payment of a note for *two hundred and ninety-nine dollars and ninety-nine cents*, would the variance have been immaterial? Suppose the note had been *jointly* endorsed by *three*, and the notice had stated the endorsement to have been made by *only one* of the three, would the variance have been immaterial? If a variance of one-half in describing a six hundred

dollar note is immaterial, does the same rule apply to a thousand dollar note, and may that be described as a five hundred dollar note, and a fifteen hundred dollar note, as a seven hundred and fifty dollar note? What variance is material, if a variance of precisely one-half in the amount of the note and the number of endorsers is immaterial? This is a point it is apprehended the members of the legal profession and the commercial community generally, would like to see explained and settled.

A reference to a few authorities showing with what certainty the Courts heretofore have required contracts to be described, as a legal proposition, may not be entirely unappropriate.

“The legal effect and *identity* of the contract must be cautiously kept in view, and *any variance* in this respect, relating to the promise or undertaking upon which the action is predicated, or the consideration thereof, will be fatal. Cowen & Hill's Notes, part 1. p. 510. A note payable at sixty days cannot be given in evidence to support a count upon a note, which count does not state when the note was payable. The variance is fatal. 7 Cranch 208, Sheehe vs. Mandeville. The plaintiff cannot give evidence that the variance was the effect of *mistake* or inadvertence of the attorney, and that *the note produced* was that which was intended to be described in the declaration. *Ib.* An omission in the declaration on a promissory note of the words, or order, or of the time of payment, or of the place where it is payable, is fatal. *They are all material parts of the note.* 9 Wheat. 558, Sobree vs. Dorr. In an action for fraudulently putting off the bills of a broken bank, where the declaration described the bills as one *ten dollar* bank bill, and ten *five dollar* bank bills, all of the Farmer's Bank in Belchertown, it was held that the plaintiff could not recover, without proving that the bills put off were of the *denominations* specified. 8

Conn. R. 363, *Watson vs. Osborne*. It makes no difference if the specification of the bills be laid under a *videlicet*. *Ib.* A variance as to the *amount* of the note is *fatal*. 2 Mart. Lou. R. 666. *Pilie vs. Mollere*. In an action *qui tam*, for taking usury, the declaration stated the taking to have been in pursuance of a loan of \$200, by means of a promissory note; and the evidence was of a loan of \$200 and *the interest thereon for more than six months*; this was held a fatal variance. 4 Day 37, *Drake vs. Watson*. So where the plaintiff alleged a loan by the defendant to A., for *sixty-three* days, and produced a note in evidence, payable to the defendant in *sixty* days; this was held a fatal variance, notwithstanding the *three* days grace added to the number of days specified in the note would have made the *sixty-three* days. *Ib.* 114. *Wilmot vs. Monson*. A note was described as being "for value received." The note produced was precisely like the one stated, except it had not the words "value received" in it. Non-suit granted, and motion for a new trial denied. 10 John. R. 418. *Saxton vs. Johnson*. An averment that two individuals made their note, their own proper hands and names being thereunto subscribed, is not supported by showing the makers were partners and the note signed by one of them in the name of the firm. 7 J. R. 468. *Pease vs. Morgan*. If a bill drawn by *John Grouch* be declared upon as drawn by *John Crouch*, the variance is fatal, 3 B. & P. 559. *Whetwill vs. Bennett*. Avowry setting forth a lease for £110 rent. The lease was for 148 acres at 15s. per acre, equal to £111 rent. The variance was fatal. 4 Taunt. 320, *Brown vs. Sayce*. In the declaration it was averred that the defendant being indebted, &c., accounted with the plaintiff for the same, being £21 6s. The proof showed that the balance on accounting was £20 18s, and the plaintiff was non-suited. 3 Maul. & Selw. 178. The plaintiff counted on a lease, stating

the rent payable in *quarterly payments*. No particular time of payment was agreed upon by the terms of the lease proved, and the plaintiff was non-suited. 2 Doug. 665. Bristow vs. Wright. If the *terms* of a contract be stated, though unnecessarily, they must be proved as laid. Ib. Lord Mansfield said, "In the present case the plaintiff undertakes to state the lease, and states it falsely. It certainly was not necessary to allege this part of the lease that relates to the time of payment, in order to maintain the action. But, since it has been alleged, it was necessary to prove it." Ib. Debt for rent on a demise at £15 *per annum*. The demise proved was £15 and 3 *fowls*; the Court held the variance fatal. Cited by Best. Sergt. Arguendo in Brown vs. Sayce, 4 Taunt. 320. In Baker vs. Edmonds, B. R. M. 23, Car. 1, it was resolved that, in an action upon a contract itself, if the party *mistake* the *sum* agreed on, he fails in his action. Note to Bristow vs. Wright, 2 Doug. 666. In Smith vs. Flickson, B. R. T. Geo. 2. Lord Hardwick says, "in contracts it is necessary to prove *all* the charges in the declaration *exactly in the manner* they are laid." Same note. If the plaintiff declare on a corrupt contract made on the 21st December, 1774, giving payment to the 23d of December, 1776; evidence of a contract made on the 23d of December, 1774, for two years, is a fatal variance. 2 Cowpers R. 671. Carlisle qui tam vs. Frears. By Lord Mansfield, there is no color for the plaintiff's recovery. The usurious contract *must be proved as laid*; whereas, the contract proved in this case, is totally different from *the* contract stated *in* the declaration. Ib. Proof that the defendant agreed to sell so many bushels of corn, *according to a particular measure*, will not support an allegation in a declaration to sell so many *bushels*; because bushels, without any other explanation, means a bushel by statute measure. 4 T. R. 314. Hockin vs. Cooke. Lawrence and

Burrough for the defendant were stopped by the Court, who said the question was whether there was not a variance between *the* contract proved and that alleged *in* the declaration, of which, the Court said, no doubt could be entertained. *Ib.* In an action against three on a promissory note, only one of whom appears and pleads, he may take advantage of the misnomer of his co-defendants on the general issue, on the ground of *a variance between the contract declared upon, and that proved.* Lord Kenyon, C. J. "This is an action on a written instrument; the evidence produced did not prove the instrument declared on." 4 T. R. 611. *Gordon vs. Austin.* If a note be stated in the declaration as payable at a particular place, but it does not appear in the bill or note, but only by way of a memorandum at the foot of it; it is a different note from the one described in the declaration, and the variance is fatal." 4 Maul. & Selw. 505.

The decision of the case of the Cayuga County Bank vs. Warden and Griswold, by the New York Court of Appeals, (1 Comk. 413,) by which it is decided as a legal proposition, that describing a six hundred dollar note endorsed by two, as a three hundred dollar note endorsed by one only, is an immaterial variance, is a wide departure from the cases above referred to, and the tendency of which will be to re-open questions long settled, and involve in constant and continued doubt and uncertainty, the liability of parties to commercial paper. †††

Supreme Court of New York--In Equity.

GARRET POST AND WIFE vs. WILLIAM MILLER, *et al.*

1. A widow to whom is devised an estate in fee, to be defeated upon the contingency of future marriage, in which case she is to have a third part of the real and personal property, and she afterwards married :—

Claimed, That the devise is not in lieu of dower and that she may hold the bequest and devise, and be endowed of one-third of the residue, and even *full dower for the whole real estate*. *Held*, that the dower was merged in the life estate devised, and the widow not having, within the time and according to the manner directed by the statute, expressed her dissent, she is deemed to have elected to take under the devise of the will.

George Rathbun, for Plaintiff.

John P. Hulbert and Stephen A. Goodwin, for Def'ts.

The opinion of the Court contains a sufficient statement of the facts of the case.

MAYNARD, J. Plaintiff's, in right of the wife, claim in fee one-third part of the real estate of Daniel Miller, deceased, her former husband, as devisee under his will.—Also, a right of dower in the land of deceased. Claiming that the devise ought not to be construed to be in lieu of dower. The clause in the will upon which the question is raised, is as follows: "After paying all my debts, I give and bequeath unto my beloved wife Calista Lovina, the use and avails of all my property, personal and *real of every name and nature*, so long as she remains my widow; and further, she shall have the privilege of making a small gift of my personal property to Worna Walker, or any other worthy person she chooses; and further, if in case of sickness or other calamities, the interest of my estate should not be sufficient for her support, then my executors shall allow her so much of the principal as shall be necessary for her comfort and happiness; and

further, in case she, my wife, shall desire to change her residence, and a good opportunity should offer itself for the sale of my estate, then my executors are hereby empowered to sell my estate and invest it in other real estate where my said wife shall desire, or loan the amount out at lawful interest, taking bonds and mortgages on real estate for security ; and further, my sister Mary Ann Miller, shall have the privilege, if my said wife so desires, of making my house, or the house of my wife her home, without cost or charge to her, so long as my wife Calista Lovina remains a widow. And further, in case she my wife should again marry, then there is to be a division of all my property made, of all my property, personal and real, and one-third of all is to be given to her, my wife Calista Lovina, and the remaining two-thirds is to be equally divided between William, John, Peter, Samuel, Elijah and Adam, and my two sisters, Mary Ann and Sally Ann, or their heirs ; and further, in case my wife Calista Lovina shall not marry, then the property or what shall remain at her decease, shall then be divided among my brothers and sisters, or their heirs."

The widow, after more than a year from the decease of the testator, her first husband, intermarried with the plaintiff Post, without taking any steps to elect to take her dower instead of the bequest and devise contained in the will ; and it is now argued in her behalf, that the bequest and devise is not in lieu of dower, and consequently that it is not necessary for her to make an election ; and that she is entitled to the one-third devised to her in fee in the latter clause of the will and dower, also in the residue, and even full dower for the whole real estate, that is, two-thirds of the residue for dower.

The estate devised to the wife by the first clause of the will, is an estate for life, for the contingency which was to determine the estate might not have happened

during her life, and such estates are deemed freehold estates while they subsist. 2 Bl. Com. 120, 4 Kent Com. 26. It being an estate for her life in all the real estate of the testator, it embraced and absorbed the whole estate and the right of dower become necessarily merged in it; it is therefore a devise in lieu of dower by necessary implication. The widow not having within the time, and according to the manner directed by the statute, expressed her dissent, she is deemed to have elected to take under this clause of the will in lieu of her dower. Whether the same result would have followed had the estate given been a term of years, it is not necessary here to decide.— The contingency upon which the wife should acquire an estate in fee in one-third part of the testator's real estate having happened, there must be a decree settling the rights of the parties accordingly, and for the appointment of commissioners to make partition, or if either of the parties desire it, a referee must be appointed to ascertain whether a partition or a sale should be made.

Supreme Court of New Jersey--April Term, 1850.

MERSHON *et al.* vs. HOBENSACK.

1. The form of a question is very much in the discretion of the Judge, and if he exercise that discretion improperly in overruling objections to a question as too leading, redress can only be obtained by application to the Court for a new trial. It is not the subject of an assignment of error.

2. Persons will be held responsible as partners, who hold themselves out as such, to those from whom they thus obtain credit, even though no such relation may in fact subsist between them.

3. In an action *ex contractu*, the non-joinder of a contractor, as defendant, can be taken advantage of by plea in abatement only. It is immaterial that the fact of non-joinder is presented by the evidence of the plaintiff.

4. Common carriers are not excused from their liability as insurers of the goods carried, because the loss occurred by the fault of some third person, and not by the negligence of the carriers themselves. In the absence of any special contract, the causes which will excuse, must be such as will fall within the meaning of the expression—act of God or public enemies.

5. *Quære*: Whether in assumpsit a defendant can be held liable as a common carrier, without proof of actual negligence, unless the character from which the duty arises, is expressly laid in the declaration?

Error to Mercer Circuit Court. The action below was in assumpsit, by Hobensack against Thomas Mershon & Son, to recover the value of goods lost on board their vessel between Philadelphia and Trenton. The plaintiff below having recovered a verdict, the defendants sued out a writ of Error to the Supreme Court. The character of the suit and the exceptions taken will sufficiently appear in the opinion of the Court.

W. Halsted, for plaintiff's in Error. Beasley & Vroom, for defendant.

The Opinion of the Court was delivered by

CARPENTER, J.—At the trial in the Court below various bills of exception were sealed upon objections to the ruling of the Judge, upon which error has been assigned in this Court. The first bill was upon an exception taken because the Judge refused to overrule a question objected to as too leading, and which was said to suggest the answer desired or expected. If the objection was well taken, as to which it is not intended to express an opinion, yet the error cannot be remedied in this mode. The form of a question rests very much in the discretion of the Judge, and if that discretion is improperly exercised redress can only be obtained by application to the Court for a new trial. It is not the subject of an assignment of error.

The refusal to non-suit formed the ground of the second bill of exceptions. The action is assumpsit and the first count alleges the defendants to have been, at the time of the delivery of the goods, common carriers between Phil-

adelphia and Trenton, and partners in said business.—The goods lost and for which the action was brought, were proved to have been purchased by the plaintiff below in Philadelphia, and delivered to Captain Mershon, one of the defendants, on board the Trenton packet "Two Sisters," in order to be carried to Trenton. There was no question as to the fact of the vessel being engaged in the freighting business generally, and that those for whose benefit she was run came within the definition of common carriers and were subject to the liabilities incident to that character. Every person who undertakes to carry, for a compensation, the goods of all persons indifferently, is, as to the liability, to be considered a common carrier. Evidence was given by the plaintiff to prove that the defendants were partners, and that they employed the said vessel in the freighting business between the two places.—The joint liability rested upon this evidence, no proof of any special contract being made on the trial. The goods were delivered generally, to be carried to their place of destination. When the plaintiff rested, the counsel of the defendants moved to non-suit, because as alleged, there was no sufficient evidence of the partnership. But even if the Judge erred, which it is not intended to intimate, yet this Court will not reverse, if sufficient evidence of the partnership was subsequently given. It will then be sufficient simply to inquire as to the proof of partnership appearing in the whole case, and which has been brought before us by bills of exceptions, afterwards sealed in the progress of the trial.

The Court having refused to non suit the defendants produced and examined a witness who stated that the vessel in question, as well as another engaged in the same business, was owned by Abner Mershon alone; that another son of the said Abner was the Captain of the boat, who received a share of the gross earnings or freight by way

of compensation for his services, and further, that Thomas was not the Captain of the boat, but was only accidentally in charge of her during the trip. But in the evidence offered by the plaintiff he did not rely merely on proof of an actual partnership of the defendants as common carriers. The case made by the plaintiff was that the defendants held themselves out to the public as partners, and were chargeable as such to third persons who gave them credit accordingly. If such case was supported by sufficient evidence, it was all that was necessary. They will be held responsible, not upon the ground of the real relation between them, but upon principles of general policy to prevent the frauds to which third persons would be liable who might give credit upon the faith of such supposed connection. The doctrine is too obvious and too well established to need the citation of authority.

The evidence showed that divers individuals about the time when this controversy occurred had had dealings with the defendants as freighters on the Delaware, and settled with them indiscriminately; that they were regarded by these persons and others as partners; that on payment of freight by such persons and on other occasions, each at different times gave receipts; that receipts so given by them were signed "Abner Mershon & Son," or "Abner Mershon & Sons," and sometimes "Abner & Thomas Mershon." Thomas Mershon, as well as his father, was proved to have given such receipts, and to have spoken of the business in terms which implied that he was jointly concerned with his father. Thomas Mershon was not only proved to have given receipts and to have taken a leading part in the transaction of the business connected with the boats, but the accounts of freight were entered in a book kept by him.

Both the def'ts. at different times spoke of the loss
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from the accident which gave rise to this action as one in which they were jointly concerned. It will not be attempted to recapitulate the testimony in detail, and it will be sufficient in general to say, that much evidence of this character was produced to show that the defendants held themselves out to the public as partners, were so reputed and dealt with accordingly. Enough was shewn to warrant the judge in submitting the question to the jury. We must suppose it was fairly submitted upon proper instructions, as no exception was taken to the charge of the Court.

In the progress of the trial, the plaintiff offered to read in evidence certain receipts, some proved to have been signed by Thomas Mershon, others by Abner Mershon, for the purpose of establishing the existence of a partnership between them. The receipts now referred to were signed "A. Mershon & Sons." The admission of these receipts was objected to and the objection being overruled another bill was sealed.

It was said that the receipts so offered went to shew, not a partnership between Abner & Thomas Mershon merely, but between Abner and two or more of his sons. Admitting that the defendants, in a suit against two partners cannot on the trial turn the plaintiff out of Court by proof of another partner against whom the action ought also to have been brought, but that advantage of the omission can only be taken by plea in abatement, the objection was, that the plaintiff in his evidence must be confined to the case as he has laid it. That in order to prove a partnership against two he cannot be permitted to prove a partnership between three persons.

The rule in regard to non-joinder is well settled and has been unquestioned since the case of Rice vs. Shutz. It is essential in an action against partners, and so against other joint contractors, in an action *ex contractu*; that the

evidence of the joint liability should extend to all the defendants, otherwise the plaintiff must be non-suited. But if all the partners are not made defendants, the case stands on a different footing. If the defendant would take advantage of the non-joinder he must do it at the proper time by a plea in abatement. By forcing defendants to plead this in abatement or waive it entirely, they cannot turn the plaintiff round more than once, by setting up fresh partners upon every new action. They must plead the whole truth of the case and give the plaintiff a better writ. It seems to be immaterial how the fact of non-joinder may be presented. Although it should appear, on the evidence produced on the part of the plaintiff, as by the bond or other written contract, that other persons are liable as joint contractors with the defendants this is not a material variance and the plaintiff will be entitled to recover. The very point in *Rice vs. Shute*, and other subsequent cases is, that a contract alleged to have been made by a sole defendant, might be supported by proof of a joint contract made by him and others. The Court would not permit the objection to be raised at the trial to the variance between the case made by the plaintiff and his proof. It has even been held that in debt on judgment against one and *nul tiel record* pleaded, it could not be objected as variance that the judgment was in fact against the defendant and others. The objection in such case must also be taken by plea in abatement. *Cocks vs. Brewer*, 11 M. & W. 51. See *Mountstephen vs. Brooke*, 1 B. & Ald., 224; 2 Phil. Ev. 132. 1 Wms. Saund. 291, note 4.

Lastly.—On the trial the defendants offered to prove that there had been no mismanagement or want of care on the part of those having charge of the vessel at the time the accident happened by which the goods were lost; that they did all that careful men could do to avoid the colli-

sion with the steamer, but that the accident was inevitable. This evidence was overruled and the defendants again excepted.

Common carriers are in the nature of insurers and the causes which will excuse them for the non-delivery of goods committed to their charge, must be events falling within the meaning of the expression, act of God and public enemies; or they must arise upon some event provided for by the contract between the parties as by exceptions in the receipt, bill of lading, or other instrument employed in the transaction. 3 Kent 216; 2 Ib. 598. In this case the goods were not receipted for; there was no bill of lading or other instrument of contract, and the liability of the defendants therefore depends upon general principles, and not upon the meaning of any particular words of exception. There was no pretence to say that the accident in this case happened by the act of God, the disclaimer being simply that it did not happen through the negligence of those having charge of the boat of the defendants. It would seem as if it was imputed to the want of due care by those on board of the steamer, as the defendants in conversation with a witness expressed their intention to apply to the Rail-Road Company, to whom the steamer belonged, for redress. As between the carriers and the owners of goods the negligence or misconduct of a third person will not excuse the former, since a remedy lies over against a party so offending. A collision which may occur through natural causes alone, as by the violence of the wind, may be called the act of God, and excused; but when it occurs through the negligence of either party, it can by no sound reasoning be brought within the meaning of that expression. The one implies a natural necessity and that the accident was inevitable; the other relates to human action merely. If negligence was imputable to either party, the defendants are not ex-

cused. Now the offer was to prove due care on the part of the defendants, not to shew that the collision was the result of natural causes beyond the reach or control of skill and care on the part of those in charge of both vessels. The offer did not go far enough to form any defence.

But if the strict rules as to common carriers are admitted, and that under the general doctrine, this might form no defence, yet it was urged that this evidence was admissible under the second and third counts, in which it was said the defendants were charged upon their special undertaking. It was said that in these counts the declaration being not upon the common law liability as common carriers, but upon their special undertaking, in which negligence is charged in the breach, negligence was put in issue.

We are not clear that the counsel of the defendants is right as to the necessity and effect of an averment of the employment of the defendants upon which the duty arises. In suits against common carriers the plaintiff may declare in case or assumpsit at his election, the former mode being sometimes advisable, in order to avoid the very difficulty which has been so much pressed in this case. When the plaintiff proceeds in case for breach of the duty to which the defendant may be subject in respect of his employment as carrier, it seems necessary to state the character from which the duty arises. 1 Chit. p. 334, (Phil. Ed. 1828 ;) 2 Ib. 357 note ; Pozzi vs. Shipton, 8 Ad. & Ell. 963.

In assumpsit, however, it has been held that it is not necessary to commence with an inducement of the defendants being common carriers. It seems to be supposed that it will suffice if the declaration merely state the delivery to the defendant, &c., and his undertaking to carry accordingly. In Dah vs. Hall, 6 Wils. 281, upon this very objection, their being no averment that the defendant was

a common carrier, it was held that it might be proved that he was a common carrier, and that he was, under such declaration, answerable for all goods delivered to his care unless within the two excepted cases. It was held that direct proof of negligence was not necessary to charge him, nor would the disproof of negligence relieve him from his liability. In 2 Chit. P. 357 note ; Bac. Abr. "carriers" A. &c. The case has been questioned as to the form of the pleadings by a late eminent jurist, but no direct authority has been produced to the contrary. The cases cited by the author referred to are rather as to the character of the evidence necessary to support the action, than upon the application of the evidence to the pleadings.—See Story on Bailments §504.

But, assuming as urged by the counsel, that the plaintiff could not proceed upon the second and third counts, upon the mere proof of the public employment of the defendants, but that a special undertaking must have been shewn to sustain those counts, yet the evidence was still incompetent. In the first count the defendants were charged as common carriers, proof of that character had been given to the satisfaction of the jury, and of the delivery and reception of the goods, and upon this the law raised the duty to deliver them at the point of destination. The plaintiff had proved his case upon the first count, and it can be no defence to such a case to offer evidence against a supposed case on other counts of the same declaration upon which the plaintiff has not proceeded. The evidence offered was no answer to the case made by the plaintiff upon the first count, and as to the second and third counts it was entirely immaterial.

Judgment affirmed.

Professor Webster's Case.

This case so thoroughly occupies public attention throughout the Union that no apology is offered for presenting the following extracts from a review of the trial, contained in the May number of the *Monthly Law Reporter*—a publication edited by STEPHEN H. PHILLIPS, Esq., a gentleman of the Bar of great abilities and respectability. The work is published in Boston, in the immediate atmosphere of the trial. The extracts are given without expressing our own opinion. That we propose to do hereafter.

[*Ed. Am. Law Jour.*]

“Dr. George Parkman, a peculiar, but eminently respectable citizen of Boston, suddenly disappeared. As he was a very punctual man, the disappearance was immediately noticed, and as he was generally known in the community, and had extensive and influential family connections, unusual efforts were forthwith used in searching for him. The whole available police force of the city, together with such auxiliaries as the most unlimited means could secure, were immediately put upon the trail. Large rewards were offered. Handbills were posted at every corner. The river was dredged. The woods were searched. And thus, for a whole week, the city was kept in perpetual agitation. Great sympathy was felt for the family of the missing man, and the public curiosity was excited to the highest pitch. At first, there was an unwillingness to believe that there could have been any foul play, and vague rumors to the effect that Dr. Parkman was sometimes liable to sudden aberrations of mind were relied upon. Gradually, after people had been dwelling on the subject, more serious apprehensions were entertained, and on Monday, Nov. 26, although it does not even now appear that any one, except Mr. Littlefield, then entertained any suspicion of the true state of the

case, a second handbill was put forth, predicated upon a suspicion of murder, and offering an additional reward.— By this time, one great fact, *which has not yet been proved*, the fact that Dr. Parkman was murdered, had become so positively assumed by the public, that we very believe nothing but his reappearance could have eradicated it.— Thus one point had been carried without proof.”

“ With the abstract question of Dr. Webster’s guilt, we shall not meddle. We have freely expressed an opinion upon that question,—an opinion which was formed before the trial, and which the events of the trial did not induce us to alter. The only question to be considered is, whether the opinions of the Court, of the counsel on both sides, and of the jury, were not formed at a period equally early. We are afraid that they were. And although some responsibility may attach to the assertion, we feel bound to say, that all the proceedings at that trial indicate an overwhelming and paralyzing sense of the prisoner’s guilt, which affected, to an unfortunate extent, the medium through which the evidence was viewed.”

“ In regard to the influence of public opinion upon the Court, we could speak with becoming diffidence. The Judiciary of this Commonwealth have always maintained, in every crisis, the most irreproachable character for integrity and independence, nor would we be instrumental in casting the slightest aspersion upon any member of the bench. The public confidence remains unshaken. But the course of the Court in Prof. Webster’s trial clearly indicates the existence and extent of an influence which was unfavorable to the prisoner. It was this. Prof. Webster had occupied a conspicuous position in society, and it was very easy to raise a cry against the Court if any unusual leniency should be allowed to him. This evidently forced the Court into the opposite extreme. Perhaps we should not say *extreme*, but it made them *over*

cautious, and inclined them to hold all doubtful points against the prisoner. In the next place, the excitement had become so intense, that a proper regard for the peace of the community urgently required that the whole proceeding should be closed at the earliest practicable period. There was great danger of a division of the jury, and if the jury divided once, they might divide again and again, until, as in the unfortunate Desha case, a pardon might plausibly be urged as the only means of terminating the controversy. This, clearly, was to be avoided, if it could be done with justice. The Court evidently thought it necessary to secure an unanimous verdict, and such a verdict as would correspond with public opinion. This is the only way in which we can account for the extremely *argumentative* character of the charge of the Chief Justice.

“The same combination of influences would naturally operate upon the prosecuting officers, and they, acting on only one side of the case, would be apt to give full scope to their previous opinions. The manner in which the prosecution was conducted is justly admitted to display the very highest degree of professional ability. The new Attorney General has established a most brilliant reputation. Nor ought we to omit alluding to his associate, who, in an humble way, by his faithful and diligent preparation of the cause, has also gained unwonted credit with the whole profession. But, at the same time, it must be admitted that the current of public opinion was in their favor. And they were urged on to an irresistible vehemence of attack, which in our humble opinion is not required of prosecuting officers. In illustration of this, we would merely refer to the mode in which the Attorney General pressed before the jury numerous facts and circumstances which might properly enough have great weight upon public opinion, but which clearly do not con-

stitute evidence upon which a man is to be convicted capitally. Of this nature are the allusions of the Attorney General to Dr. Webster's course when arrested, and, during the progress of the trial, to the fact that he waived an examination at the Police Court, to the circumstance that Dr. Parkman's will had been admitted to probate, (clearly *res inter alios acta*,) and most of all to the assertion, made when it was too late to contradict it, that but a part only of the witnesses summoned to prove the so-called *alibi* of Dr. Parkman had been put upon the stand. And this is to be regretted the more, inasmuch as the Attorney General seems to entertain the same views of the duty of a prosecuting officer with ourselves.*

"The counsel for the defence manifested great embarrassment in the management of their case. And this was so apparent, that we cannot but think that it tended more than any thing else to injure the prisoner's case in the estimation of the public and of the jury."

"This leads us to consider, briefly, the conduct of the jury. And we are free to say, that, according to the published letter† of one of their number, they do not seem to have discharged their duty as became them. We have no doubt they were deeply impressed by the responsibility of the occasion. We think that they were *overwhelmed*

*In Mr. Clifford's opening, the following passage occurs:—"I desire gentlemen, here in the very opening of these proceedings, distinctly, and under the sense of the responsibility which rests upon me, to apprise you of the view that I take of my duty in the case. I regard it, gentlemen, to a great extent, in its essential character, as a judicial one. I am here to aid and assist you, as well as I am able, in arriving at the truth. The too common idea of the functions of a prosecuting officer, that he is to press a prosecution beyond what any fair-minded seeker after truth would press it, I repudiate and disavow. I have always done so. And if such a demand were made upon me by the supposed exigencies of my office, I certainly would not hold that office for a single hour. I am here to represent the Commonwealth, to see that, as far as in me lies, the justice of the Commonwealth is vindicated, and the rights of every person who is charged with violating it no less protected. I shall endeavor, therefore, to perform that duty with fairness to this prisoner, and fidelity to the community and the Commonwealth, which you and I alike represent here."

†The publication of this letter was, most clearly, improper.

by it. That they were conscientious, we shall certainly not dispute ; and it would be irreverent to deny that their frequent prayers ascended from as pure hearts and fervent spirits, as ever, in old times, did the prayers of devout Puritans, while burning witches and hanging Quakers to the glory of God. But that Dr. Webster's jury were any calmer than our ancestors in the seventeenth century, we cannot believe for a moment. They do not seem to have discussed the question with the calmness which became them, but without consideration, without reflection, under the influence of that stupor which a fortnight's confinement, and the painful excitement of a court room induced, they seem merely to have reflected back the impressions given them by the Attorney General and Chief Justice. It was not their deliberate verdict upon the law and evidence. It would have been proper to have taken a vote by ballot, thus giving to any dissenting juror, the opportunity of manifesting his dissent without running the gauntlet between his excited fellows. But no. In the jury room, as well as out of doors, the *vis major* of public opinion was brought to bear with terrific energy. Individual opinions and individual doubts quailed beneath the pressure. Perhaps we are severe. But if there is any duty which the friends of law owe to the public, it is to vindicate individual right against the tyranny of the mass ; and when a jury trial is to be debased into a mere machine for developing, in a more concentrated form, the malevolent essence of public opinion, it is our duty to protest against it. If it be urged that the jury acted conscientiously in the discharge of their duty, and we have no doubt that they did,—for the published letter which has been permitted to remain uncontradicted, proves conclusively that they meant to do right,—the matter has even a worse aspect. For it would seem to demonstrate that a jury taken from the body of the county, with the

ordinary frailties and imperfections of mankind, are unequal to the task which this jury were called upon to perform. This is the result to which we fear that we must come. We cannot but think, after reading the juror's letter with care, that they must have reasoned somewhat in this wise. "Before we were empaneled, every thing looked as if Dr. Webster was guilty. What have we heard to justify us in finding a verdict of not guilty?"—thus throwing the burden of proof entirely upon the prisoner.

"In this connection, let us briefly call attention to another point. In empanneling the jury, the court propounded three questions to those summoned. Two of these questions are required by the statutes of the Commonwealth.† The third—in regard to scruples upon the subject of capital punishment—is not required, nor do we know how to justify it. If a juror has such scruples as the question would indicate, he is guilty of perjury if he takes an oath to try the case upon the law and evidence, with any mental reservation on account of the character of the punishment. To this it will be answered, that such an oath is no security. Very well, the oath is the only test which human ingenuity can devise, and it does not become a lawyer to maintain its want of efficacy. We do not object to government's proving *aliunde* a morbid state of mind which would incapacitate a juror. The government and the prisoner should each have that right. But it is a hard rule which allows the Court to winnow from the jury every spark of humanity, by systematically propounding a question not contemplated by any statute. It is a vulgar error that the English law excludes butchers from the jury box. This error results from a public conviction that the nature of their employment blunts their sensibilities. Why, then, would it not be fair for the Court to ask

† Rev. St. ch. 95, § 27.

each juror, whether his ordinary avocations rendered him so familiar with scenes of suffering as to extinguish the original sensibilities of his nature? Yet, if this course were adopted, we fear that some would say that it undermined the bulwarks of the Constitution. But it would be no more irregular than the third question usually propounded by the Court.

“Let us recur to the course of the Court. Several minor questions were raised, not worth attending to now, but upon two points we would most humbly dissent from the ruling of the Court. In the first place, as to a *view* of the premises. It appears that upon the morning of the second day of the trial, the jury were engaged in examining the Medical College. We are not sure that it is any where so reported, but we know it to be true, that the junior counsel on each side accompanied them in that examination. The practice, hitherto, has certainly been to send out the jury in charge of sworn officers,* whose duty is merely to exclude external influences, not to explain the case. But in this instance, the novel expedient was adopted of sending the counsel to explain matters. True, both sides were represented, but the Court was not. Who then could check the counsel on either side if they transgressed their province? As well might the counsel on each side be sent into the jury room to relieve a discordant jury.—It should, moreover, be remembered, that this view was had before any evidence was submitted in regard to the Medical College, and that, consequently, the jury, instead of listening to that evidence with unbiased minds, had received previously all the unfavorable impressions which an examination of the gloomy laboratories could not fail to give.

“In the next place, the whole community shudders at

* Upon the trial of the Knappe, in Salem, in 1830, a view was refused by the Court.

the law of malicious homicide as expounded by the learned Chief Justice :

" Now gentlemen, there are two things to consider. From the law which I have read to you, it appears that if two persons meet, and one voluntary destroys the life of the other, and no evidence appears, either in the testimony brought to convict him, or in that produced in his behalf, to show provocation, or heat of blood, it is held to be murder, or homicide with malice. I have stated that malice may be either implied or expressed. Malice express is where there is evidence of design, in the previous acts or conduct of the accused.

" Murder by poison must be by express malice, because there must have been preparations previously. But whether malice, in any case, be express or implied, it is always murder, if the homicide be voluntary, and not death produced in heat of blood.

" There are two theories on which this is thought to be murder. One is, that it was by express malice ; and the other is, that it was by implied malice ; that is, if the express malice is not proved, and if the mitigation to manslaughter is not proved, still, in cases where there is not accident or suicide, it is murder by implied malice."

" This point of law, unfortunately, is not new in this Commonwealth.* It was held in *Peter York's* case, and it is generally admitted as good law elsewhere.† It is also to be said, that had our legislature entertained views different from those set forth in *Peter York's* case, ample time has since elapsed for the prevention of it by positive statute. But nothing of this kind has been done, and the Court would seem to be bound by their previous decision. It is however, much to be regretted, that the manly views contained in the dissenting opinion of Mr. Justice Wilde, could not be adopted as containing the true rule of law.‡

* 7 Law Rep. 580.

† The New York Code of Procedure adopts this principle in a most startling form.

‡ Taking into consideration all these authorities and *dicta*, and the statements of the law of homicide by the writers on criminal law, I am of opinion that the following conclusions are maintained on sound principles of law and manifest justice : 1. That when the facts and circumstances accompanying a homicide are given in evidence, the question whether the crime is murder or manslaughter is to be decided upon the evidence, and not upon any presumption from the mere act of killing. 2. That if there be any such presumption, it is a presumption of fact, and if the evidence leads to a reasonable doubt whether the presumption be well founded, that doubt will avail in favor of the prisoner. 3. That the burden of proof, in every criminal case, is on the Commonwealth to prove all the material allegations in the indictment ; and if, on the whole evidence, the jury have a reasonable doubt whether the defendant is guilty of the crime charged, they are bound to acquit him." Dissenting Opinion of WILDE, J., in *Commonwealth vs. York*, 9 Metc. 133.

Our legislature has not yet adjourned, and we confidently hope that, by some enactment, they will modify the rigor of this rule.

"One other point, touching the sufficiency of the fourth count, was considerably discussed, but there is probably no great division of opinion in the profession on that question. Nevertheless, we cannot suppress our astonishment at the following passage in the charge of the Chief Justice :

"It is said, that there are various forms of indictment adapted to many of the modes in which death may be inflicted. But is not science continually discovering new modes? Suppose, in the chemical laboratory, a person might be held fast, while chloroform was placed over his mouth, until he dies. Suppose such a case has never before occurred. *Shall such a party escape on that account? I think not.*"

"If this does not contain a suggestion in about as plain language as the Court could use, that, in their opinion, Dr. Parkman was killed by chloroform, we do not understand the meaning of words. It is most extraordinary, when we remember that no evidence had been introduced in regard to chloroform. Even the Attorney General said :

"Why, it is suggested that the lasso might have been cast around his neck. Was there any evidence before the grand jury which could justify them in saying, upon their oaths, that this was the way in which the murder was committed? It is perfectly true, that a galvanic battery might be so prepared as that, when a man is walking over the wires, he shall be prostrated, and deprived of consciousness. But we must have evidence of it."

"These strong suggestions by the Court seem to go beyond its legitimate province, and we fear had too much influence upon the jury.

"In conclusion, for, although there are many other points of interest to the profession connected with this case, our limits will not permit us now to recur to them, we feel that upon the evidence fairly before the jury, the prisoner ought not to have been convicted of the crime of murder. More than this we need not say. But it may not be improper to add, that this is a result which has been

arrived at only after a careful examination of the evidence. Our impressions, upon first hearing the verdict, were decidedly otherwise. We greatly fear now, that that verdict was the result of a pre-occupied public opinion, which was brought to bear most violently upon the Court, the counsel, and the jury, and that while not the slightest reproach can be thrown upon any concerned, the intensity of the public excitement prevented a fair trial.

In the Common Pleas of Armstrong County, Pa.

Voluntary Submission.—Rule to Strike off Proceedings.

JOHN BROWN AND MARY BROWN vs. NICHOLAS LONG.

Judgment entered on an award stricken off for uncertainty in the award, and the parties left to their remedies on the arbitration bond or on the award.

Some three or four years previous to December, 1849, the plaintiffs had conveyed to the defendant a tract of land, in consideration of sustenance for the remainder of their lives. Quite a number of controversies and suits having sprung up under this arrangement, the parties on the 22d day of December, 1849, entered into a submission bond, in the usual form, stipulating that "all and all manner of actions, cause and causes of action, suits, debts, strifes, accounts, reckonings, sum and sums of money, trespasses, quarrels, bonds, specialties, real estate, and all other matters and things whatsoever," should be referred to Jacob M'Cartney, John Kerr and S. Ownes, Esqrs., whose award was to be final and conclusive. Appended to this was the following memorandum:—"It was

intended to have been entered in the above bond, that the Prothonotary of Armstrong country, should enter judgment upon the award of arbitrators; we the parties agree that judgment be entered accordingly."

(Signed by the parties.)

On the 15th of February, 1850, the award of arbitrators was filed in the Prothonotary's office, finding "in favor of John Brown, Sr., and Mary Brown, all the lands in the possession of N. Long, conveyed to Long by said Brown and wife—possession to pass to Brown on the 1st day of April, A. D. 1850; also we do find for Nicholas Long, defendant, five hundred and six dollars, and all the grain in the ground; the money to be paid as follows: two hundred dollars on the first day of April, 1850; one hundred and fifty-three dollars on the first day of April, 1852; and one hundred and fifty-three dollars on the eighth day of February, 1854: *John Brown, Sr., and Mary Brown to go into possession clear of all incumbrances—liens to be removed off the Prothonotary's docket at the expense of Long—parties to pay the costs of this suit in equal proportions.*"—The same day the Prothonotary made the following docket entry: "Judgment on the award." At this time the liens against the land amounted to about three hundred dollars. The defendant, Long, not being satisfied with the award, obtained a rule at March Term, to shew cause why the whole proceedings should not be stricken off the record.

Boggs and Lee, in support of the rule.

Cantwell, Fulton and Phelps, *contra.*

KNOX, P. J. This bond is certainly broad enough to cover the whole controversy between the parties, and sufficient to support the award. But the award itself is uncertain. There can no judgment be entered on it, on which execution could issue. The rule must, therefore, be made

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absolute, but so as not to affect the award itself. The parties are left to their remedy on the bond or on the award.

IN THE COMMON PLEAS OF ARMSTRONG COUNTY, PA.

Distribution of Proceeds of Sheriff's Sale.

HAMPTON, SMITH & CO. vs. HENDERSON AND JOHNSTON.

A Sheriff's sale of a landlord's interest in real estate destroys his remedy by distress for arrearages of rent, and with it the right to claim the money in the Sheriff's hands arising from the sale of personal property of the tenant in possession—*Vide 4 Penn. Law Jour.* 282-3.

The question before the Court, in this case, arose on exceptions taken to an Auditor's Report, distributing a fund in Court, raised out of the sale of the personal property of defendants. A. Woodward was the owner of "Rock Furnace," in Armstrong county, on the 1st of May, 1849, when he rented it to Joseph Clark for \$100 *per month*. There was nothing said how long the lease should continue. On the 2d October following, Clark sold out his stock, &c., at the furnace, to the defendants who went into possession, and commenced working it up. On the 19th of September, previous, however, the premises on which the furnace was erected, were sold to W. W. Wallace, by the Sheriff, as the property of A. Woodward, and a deed made and acknowledged accordingly on 16 Nov., 1849. Under this state of things Woodward gave the Sheriff notice, at the sale of defendants' personal property, to retain and pay over to him \$600, which he claimed as rent, from the time he leased to Clark, to the time of sale, 16th November, 1849. The only question before the Court was, whether Woodward had a right to the rent from the time he rented to Clark, to the time of

sale. The Auditor awarded the fund to the plaintiff, and Woodward excepted.

Lee for plaintiffs. Woodward has no right to the fund in Court. Henderson and Johnston succeeded Clark, to whom he rented; and according to the principle decided in *Clifford vs. Beems*, 3 W. 247, the tenant who succeeds a former tenant, is not liable for previous rent. The title of Woodward was divested by the sale to Wallace, he had no right to distrain, and consequently no right to the fund in Court.

Phelps, contra.

Per Cur. We see no reason for the exceptions to the report of the Auditor. The fund, we think, has been properly applied to the judgment creditors; the exceptions must, therefore, be overruled and the report confirmed.

District Court of the United States—Wisconsin District.

JANUARY TERM, 1850.—AT MILWAUKIE.

ROBERT LUDINGTON AND HENRY U. KING vs. SOHOONER NUCLEUS, ALANSON SWEET, *Claimant*.

Contracts for materials furnished, at the home port, in the building of steam-boats and other vessels, are not within the act of Congress, extending the jurisdiction of the District Courts, to certain cases, upon the lakes, and navigable waters connecting the same. Approved Feb. 26, 1845.

MILLER, J. The demand of these libellants, is for materials furnished in the building of this vessel. It appears in evidence, that the vessel was launched in the month of June, 1848; and that a very small portion of the materials were furnished after that date. The libel

lants furnished the materials, from their store in Milwaukee, to the builders of the vessel at the same place, at different times, from the month of Nov. 1847, to the month of Oct., 1848. The vessel was enrolled and licensed, in the month of October 1848, and made her first voyage in the spring of 1849; and before the filing of this libel.

The claimant, in his answer, denies that, at the time the cause of action accrued, this vessel was enrolled and licensed for the coasting trade, and was employed in business of commerce and navigation, as set forth in the libel.

By the law of this State boats and vessels used in navigating the waters of the State, are liable for the materials used and labor bestowed, in their construction; and a party can file his claim and proceed, in the Courts of the State, against the boat or vessel by name.

Contracts for marine service, in building, repairing and supplying ships, are cognizable in Courts of Admiralty, as maritime and appertaining to commerce and navigation; and when a lien is given by the local law, they may be enforced by Admiralty process. *The Gen. Smith*, 4 Wheat. 438; *The St. Jago de Cuba*, 9 Id. 409; *Peyroux vs. Howard*, 7 Peters 324; *The Steamboat Orleans vs. Phœbus*, 11 Id. 175; *The Jerusalem* 2 Gall. 345, *adm. rule* 12.

Demands for materials furnished and labor bestowed in the construction of vessels not launched, are decided to be within the Admiralty jurisdiction, where the local law gives a lien; provided such vessels are *intended* or *designed* for maritime business upon the high seas, or tide waters; *Read vs. The Hull of a new Brig*, 1 Story's Rep. 244; *Davis vs. A New Brig*, Gilp. Rep. 473, *Hooper vs. The New Brig*, Id. 536; *Stevens vs. The Sandwich*, 1 Pet. Ad. Dec. 233 note. As the employment of these

vessels was to be maritime, the contracts for labor and materials were for maritime purposes. The contracts were such as touched rights and duties appertaining to commerce and navigation; and were enforced by admiralty process against vessels, which from their location and construction were designed, or intended for the employment of commerce and navigation upon the high seas, or tide waters. From these authorities, it appears, that this Court might entertain jurisdiction of this cause, if jurisdiction co-extensive with the Admiralty jurisdiction of the National Courts, has been extended to the lakes.

The only act of Congress, conferring upon this court jurisdiction, similar to the admiralty jurisdiction possessed by district courts, in pursuance of the constitutional provision, is "an act extending the jurisdiction of the district courts, to certain cases, upon the Lakes, or navigable waters connecting the same;" approved Feb. 26, 1845. By this act, "the District Courts of the United States shall have, possess and exercise, the same jurisdiction in matters of contract and tort, arising in, upon, or concerning steamboats and other vessels of twenty tons burden and upwards, enrolled and licensed for the coasting trade, and at the time employed in business of commerce and navigation, between ports and places in different States and Territories, upon the lakes and navigable waters connecting the said lakes, as is now possessed and exercised by the said courts, in cases of the like steamboats and other vessels employed in navigation and commerce, upon the high seas, or tide waters, within the admiralty and maritime jurisdiction of the United States; and in all suits brought in such courts, in all such matters of contract, or tort, the remedies and the forms of process, and the modes of proceeding shall be the same as are, or may be used by such courts in cases of admiralty and maritime jurisdiction; and the maritime law of the

United States, so far as the same is or may be applicable thereto, shall constitute the rule of decision in such courts in the same manner, and to the same extent, and with the same equities as it now does in cases of admiralty and maritime jurisdiction." "The object of this act appears to be, first, to bring these cases within the cognizance of the district courts, without regard to the citizenship of the parties, as cases arising under a law of the United States, (that is to say, under the act itself;) and, secondly, as far as it could constitutionally be done, to apply to them the same rules, both of procedure and of decision, as if they had pertained to ocean instead of inland navigation, and so been strictly of admiralty jurisdiction; or in other words, to subject them to the operation of the admiralty law of the United States." Conkl. Adm. 6.

In the construction of statutes generally, "everything which is within the intention of the makers of the act, is as much within the act, as if it were within the letter; *Zouch vs. Stowell*, Plowd. 366. The meaning of the legislature may be extended beyond the precise words used in the law, from the reason, or motive, upon which the legislature proceeded, from the end in view, or the purpose which was designed." *The United States vs. Freeman*, 3 Howard 556. Upon these rules, it is plausibly argued, that this case falls within the act in spirit and intent. But this is an act to extend the jurisdiction of courts, not of inferior, but of limited jurisdiction, created by law.—In the exposition of such a statute every part is to be considered, and the intention of the legislature extracted from the whole. Such intention must be apparent on the face of the statute; *Wilkinson vs. Ieland*, 2 Peters 627. *United States vs. Fisher*, 2 Cranch 358.

The jurisdiction of Courts, of limited jurisdiction, created by statute, should be made affirmatively to appear, for "the fair presumption is, that a case is without the juris-

diction until the contrary appears." And it is "necessary, inasmuch as the proceedings of no court can be deemed valid further than its jurisdiction appears, or can be presumed to set forth upon the record, the facts or circumstances which give jurisdiction, either expressly, or in such manner as to render them certain by legal intentment." *Turner, administrator of Stanly vs. The Bank of America*, 4 Dallas 11, (1 Cond. Rep. 205.) Courts, which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction. These rules have been rigorously adhered to by the courts of the United States, at all times and under all circumstances; *Kemp's Lessee vs. Kennedy*, 5 Cranch 185; *McCormick vs. Sullivant*, 10 Wheat. 192. *Exparte Bullman and Exparte Swartwout*, 4 Cranch 75, 96. *Grignon's Lessee vs. Astor*, 2 Howard 319—and many other cases.

It is well understood that the federal courts do only possess and exercise jurisdiction, conferred by the constitution and laws of the United States; and that such jurisdiction must be shown by facts, or circumstances properly pleaded. Before this court can possess, or exercise the *quasi* admiralty jurisdiction conferred by the act, it must be alleged in the libel that "steamboat, or other vessel, is of twenty tons burden or upwards, enrolled and licensed for the coasting trade, and at the time when the cause of action accrued, was employed in business of commerce and navigation between ports and places in different States and Territories, upon the lakes and navigable waters connecting the said lakes." Upon that averment, or allegation in the libel, the court is authorized and empowered by the act to exercise the same jurisdiction as "in cases of the like steamboats, or other vessels employed in navigation and commerce upon the high seas, or tide waters, within the admiralty and maritime juris-

diction of the United States." This averment in a libel, is as essential to confer jurisdiction under the act, as that of citizenship, or alienage in a declaration or bill, under the act to establish the judicial Courts of the United States, approved September 24, 1789.

It no where appears in this very cautiously drawn statute, that Congress intended to confer upon the courts, full admiralty jurisdiction, which is limited by and depends primarily upon the nature of the contract, or tort. But, "on the contrary, Congress seems to have had an eye, rather to the provision of that constitution which confers upon the national legislature, power to regulate commerce among the several States; and upon the judiciary jurisdiction of "all cases arising under the laws of the United States;" and to have intended merely, to subject the descriptions of cases, specified in the act, to the practical operation of this constitutional provision, and *sub modo*, to the admiralty forms of procedure," Conk. Ad. 4. From a critical examination of the act, it is reasonable to infer, that Congress strictly pursued the following intimation of the Supreme Court, in the *steamboat Jefferson*, 10 Wheat. 458, (6 Cond. 173)—"Whether, under the power to regulate commerce between the States Congress may not extend the remedy by the summary process of the admiralty, to cases of voyages on the western waters, it is unnecessary for us to consider.—If the public inconvenience, from the want of a process of an analogous nature, shall be extensively felt, the attention of the legislature will doubtless be drawn to the subject." The increasing commercial intercourse between the different States, by means of lake navigation, required more than the ordinary legal remedies afforded by the State tribunals.

The title of the act implies a limited or partial extension of jurisdiction to the courts. The *certain cases* allu-

ded to in the title, are described in the act, to be "matters of contract and tort, arising in, upon, or concerning steamboats or other vessels of twenty tons burden or upwards, enrolled and licensed for the coasting trade, and *at the time* employed in business of commerce and navigation, between ports and places in different States and Territories, upon the lakes and navigable waters connecting said lakes." These are terms of description and of limitation, as well as of jurisdiction. The steamboat or other vessel must be of twenty tons burden or upwards, enrolled and licensed, and *at the time* the cause of action accrued, employed in business of commerce and navigation on the lakes, &c. The jurisdiction of the courts is not intended by the act, to be ascertained or determined, by the nature or character of the cause of action alone; but also, by the description and employment of the vessel. The vessel is required to be employed in business of commerce and navigation *at the time* the cause of action accrued; and not, as in the courts of admiralty, merely *designed or intended* for such employment. The words "at the time" seem to have been cautiously inserted in the act for the purpose of confining the jurisdiction conferred within the actual necessities of commerce upon the lakes. The actual necessities of commerce require that the summary jurisdiction of the admiralty should be exercised; in cases of contracts and torts strictly maritime, which no doubt was the inducement to the enactment of the statute under consideration; and may be a reason for its cautious and limited terms.

It has been observed before, that upon contracts for supplies or materials furnished, or labor bestowed, in the construction of boats or vessels, it is only in virtue of State laws, that a lien is deemed to attach. Because, such lien is created by the State law, it is enforced in the admiralty, otherwise the parties would have to resort to

the common law remedies. The lien created by the State law, is regarded as in its nature maritime, and is, therefore, recognized in courts of admiralty, and enforced by admiralty process. But the contract, being an ordinary transaction between persons on shore, and of the same place, the necessities of commerce do not require the the creation of a lien by statute. The principal reason, or necessity for such a lien, is for the better security of the material man and shipwright. This is a subject of local legislation, induced by local policy ; and not absolutely necessary to be brought to the consideration of the national courts, but properly cognizable in those of the State. To enforce this lien the State Courts possess full and complete power and authority. But as liens cannot be created by the laws of a State, in cases of damages by torts, and of contracts entered into, without its Territorial limits, the exigencies of commerce required the summary process of the admiralty, in cases of contracts and torts of steamboats and other vessels afloat, or employed in business of commerce and navigation on the lakes.

Parties are not required by the act to resort to the federal courts, in pursuit of the remedies thereby provided for, as to courts of general admiralty jurisdiction. The act saves the "right of a concurrent remedy at the common law, when it is competent to give it ; and any concurrent remedy, which may be given by the State laws, where such steamer, or other vessel, is employed in such business of commerce and navigation." This saving provision, probably, was not necessary, as parties can select their own tribunal ; but it may tend to show, that the certain cases of contract and tort, made cognizable by the act, in the courts of the United States, are not to be deemed exclusively within the jurisdiction of those courts, as courts of admiralty. A similar inference may, probably, be drawn from the saving provision in the act, of the

“right of trial by jury of all facts put in issue in such suits, when either party shall require it;” as the trial by jury is unknown to courts of admiralty, where the civil law mode of trial is alone followed.

I do not deem it necessary for the libellant, at the hearing, to prove that the steamboat or vessel was actually enrolled and licensed. The evidence of the enrolment or license is in the possession or within the knowledge, or perhaps under the control of the respondent. The presumption is, that a vessel would not be employed in business of commerce and navigation, without a license, and in violation of the revenue laws, at the risk of a forfeiture. A proper allegation, or averment in the libel of the facts or circumstances, required by the act to confer jurisdiction, is sufficient, unless denied by a plea to the jurisdiction of the court, and sustained by proof, as in cases at law or in chancery. Nor is the extent of the employment of a steamboat or vessel a material subject of inquiry. If a steamboat or vessel is afloat and ready for such employment as the act contemplates, she would, I think, be subject to the admiralty process of this court.

For these reasons, I am of the opinion, that contracts for materials furnished at the home port, in the building of steamboats or other vessels, are not within the act of Congress, extending the jurisdiction of the District Courts to certain cases, upon the lakes and navigable waters connecting the same—approved Feb. 26, 1845; and this court must therefore, in such cases decline the exercise, of the *quasi* admiralty jurisdiction conferred by the act.—The libel is ordered to be dismissed, for the want of jurisdiction.

Supreme Court of Pennsylvania--Middle District.

ABSTRACTS OF DECISIONS FOR MAY TERM, 1850.

[Reported for the American Law Journal by P. C. SKEWICK, Esq.]

Fisher qui tam vs. Patterson. Error to Huntingdon. ROGERS, J. The selling of foreign goods and merchandise out of a canal boat along the lines of the canal comes within the description of a "hawker, pedlar or petty chapman, traveling from place to place, selling or exposing to sale foreign goods, wares and merchandise," under our act of Assembly; and exposes the offender to the penalty of that act. Judgment reversed, &c.

McMahon vs. McMahon. Error to Huntingdon. BELL, J. When a parol partition of lands held by several joint heirs, was made in the absence of one, and the portions of each set apart by metes and bounds, and the portion of the absent one was thrown into common with one other unauthorized, the one who was absent may at his option demand a new partition of the whole tract, regardless of long continued possession by each; or he may, (as was the case here,) adopt all the features of the partition and recognize the act of the one who took his purpart as his own, and come upon it with all the improvements and maintain ejectment for the same. Nor will the statute of frauds intervene. The acts of the self constituted agent, by such ratification, becomes in contemplation of law the act of the principal.

N. B.—Mr. Justice COULTER dissented. He held the parol partition as void, and that the absent one should have gone against the whole tract; or if he affirmed the act of the one who took his purpart, it should have been as it was made, and that was by paying his debts, which were liens upon his portion with the interest.

Sormfelt vs. The Manor Turnpike. Error to Lancaster. COULTER, J. Though the power of the Legislature, in virtue of the right of eminent domain, to establish a turnpike gate in the street of a city is not to be questioned, yet the grant of such a right is not to be inferred without an express enactment. The words relied upon here authorizing the company "to erect gates in Manor street or elsewhere, according to the provisions of the original act," are too indefinite; besides the original act does not speak of Manor street. And the word "elsewhere" is too indefinite

to found a right upon. The Legislature meant by Manor street nothing more than Manor road.

Judgment reversed, and judgment for defendant.

Stouffer vs. executors of Huines. BURNSIDE, J. The principle decided is analagous to the case of *Comfort vs. Eisenbise*, decided at the last term, but not yet reported. There it was held that a promise by a bankrupt to pay a debt discharged by bankruptcy is binding, though not made to the creditor or to his authorized agent. Further: A court has no right to submit a point assumed by counsel without some evidence from which it may be fairly inferred, as was decided when the case was in the Supreme Court before. It was fairly left to the jury, that if the note was not given at the time it bears date, they should find for defendant.

The Courts of Common Pleas have a right to make rules to regulate a request for instruction on points; and it is not error to refuse instruction where, according to the rules established, they have not been submitted to the opposite counsel.

Judgment affirmed.

Administrator of Hiestand vs. Porter. Error to Lancaster. ROGERS, J. A power given in the deed to the executors to sell at the death of the widow, is well executed in her life time, whenever she, as one of the executors, joins in the deed, if the widow for whose benefit, as is apparent from the will, the sale is postponed, thus signified her consent by joining, and the fee will pass to the purchaser. The intention of the testator governs the case, and makes it an exception to the general rule, that a devise to executors to sell upon a certain contingency, cannot be executed till the contingency happens.

The remainder men cannot complain that the particular estate was yielded before it fell, and especially if benefitted by an early receipt of the proceeds.

N. B.—Mr. Justice COULTER dissented, holding the case to be within the general rule, that there was no power to sell before the death of the widow, and there was no provision made before that time, for distribution of the proceeds.

Judgment affirmed.

Spangler vs. The County of York. Error to York. BELL, J. Where the dower fund of a widow is directed to be invested in real estate, and the interest to be paid to her during her life, the principal to be divided at her death, the sum so put at interest is taxable for State and County purposes, under the act of 11th June, 1840, and the tax is not to be paid out of other monies of the estate; or out of the trustee's proper funds; or out of the principal sum so invested; but on the principle that whoever presently enjoys the subject, ought to discharge the present impost. The

present beneficiary is liable to pay the taxes. The burden must come from the produce of the fund.

Judgment affirmed.

Hoffman, et al. vs. Danner et al. Error to York. BELL, J. The quantity of land which passes by Sheriff's sale, is to be ascertained by the extent of the levy. As at the date of the execution the whole lot in controversy belonged to the defendant in execution, the plaintiff might have directed a levy and sale of the whole of it, yet he was at liberty with the assent of the debtor to embrace a less quantity, and if he did so, or permitted the Sheriff by the use of a limited and restricted description, to indicate an intent to take in execution a smaller portion, the purchaser, who claims only through the proceedings of the officer, will not be permitted to stretch his ownership beyond the designated boundaries, even though the Sheriff's conveyance, by an extended description, might seem to afford warrant for such a pretension.

Though the construction of written instruments is within the exclusive province of the Court, yet where the quantum of the estate and its limits, as in Pennsylvania, must frequently depend upon evidence *de hors* the writing, and thus become a question of fact, it is error to direct peremptorily a verdict.

This is peculiarly true of the loose written returns of our writs of execution, which ignorance and carelessness combine to divest of every feature approaching to certainty. It is necessary to allow the liberal use of assisting evidence, oral and documentary, to correct mistakes, explain ambiguities, and apply indeterminate delineations to disputed localities. If the return is intelligible of itself, and ascertains with precision the tract taken in execution, no room for explanatory proof is afforded, and none will be received to contradict the official act. But where either from the generality of the terms used, uncertainty of delineation, or seeming contradiction of description, a doubt is raised affecting the boundaries of the levy, its locality or extent, recourse must be had to evidence *aliunde*, in which case it becomes a legitimate object of investigation for a jury.

In this case, the Court below proceeded upon the idea that the return of levy "upon a lot, marked in the plan of Hays addition, No. 14," in connection with the plan itself, is so precisely descriptive, as not to be controlled by subsequent specifications of boundary. In this there was error. If any thing showed that the Sheriff might have reference to a fact, line or boundary which reduced the lot he intended to take in execution, to the width of three perches, the jury should have been called to the aid of the Court.

Judgment reversed, and a *renire de novo* awarded.

Melhorn vs. Moritz. Error to Adams. COULTER, J. Though in the

action for a breach of the promise of marriage the contract must be mutual, so as to have consideration, yet witnesses need not be called to attest it when made to sustain the action, out of regard to the delicacy of the female. It must be proved by the concomitant circumstances.

In this case a distinct promise was proved on the part of the defendant; and it was competent for the plaintiff to prove such circumstances, as that she had requested her brother to take her to Gettysburg to buy her wedding clothes; that she had engaged her bride's-maid; that she named a day certain for the wedding; that the wedding clothes were purchased, and guests invited; to make out the mutual promise. This is only circumstantial evidence, in place of direct evidence of her agreement, at the time the engagement was entered into.

And evidence that the defendant was subsequently married to *Hannah*, instead of *Ann*, as charged in the declaration, was not error. The statement of the name to whom he was married was immaterial; it might have been struck out of the narr., as it was laid under a *videlicet*. Even if material, the narr. would be good on the principle of *idem sonans*.

Judgment affirmed.

Emery vs. Harrison. Error to York. COULTER, J. Deeds for lands sold under the laws of the United States for non-payment of taxes, are not even *prima facie* evidence of title or right, without proof of authority to sell, and all the other pre-requisites, such as that the seller was collector of that district, evidence of assessment, of a personal call for the taxes within sixty days after assessment, that there was no personal property, of advertisement as required by act of Congress, &c.

Though a father may admit a tenancy of the land in dispute, yet if there is no privity of possession or estate between the father and son, the latter will not be affected; and a deposition which goes no further, and without an offer to follow up, may be properly rejected.

Judgment affirmed.

Bear vs. Bear. Error to Lancaster. BURNSIDE, J. In a devise of land by boundaries, a mistake in the quantity devised will not control the boundaries, so as to let in the residuary legatee for the excess; nor will it be held that the testator died intestate in regard to it.

Judgment affirmed.

McCracken, et al. vs. Gillam. Error to Huntingdon. BURNSIDE, J. In a suit for the unpaid purchase money, when it appeared that the plaintiff had said that the title was good, and he would make a good title, but in fact did not warrant either specially or generally, and the title failed, the plaintiff cannot recover. The *onus* lies on the vendor, to show the purchaser took at his own risk.

Judgment affirmed.

SUPREME COURT OF UNITED STATES.—*Bayard vs. Lombard et al.* The Supreme Court, at Washington, D. C., affirmed the judgment of the Circuit Court, deciding the important principle that a judgment entered in the Circuit Court of the United States for the Eastern District of Pennsylvania, is a lien upon all the lands situate within the limits of its territorial jurisdiction.

New Publications.

THE AMERICAN ADMIRALTY, its jurisdiction and practice, with practical forms and directions. By Erastus C. Benedict. Published by Banks, Gould & Co., New York : and Gould, Banks & Gould, Albany.

Of the manner in which the enterprising publishers have performed their duty in presenting this work to the profession it is not necessary to speak. The long established reputation of Banks, Gould & Co., is a sufficient assurance that the printing and publishing departments have been under careful supervision.

The first 338 pages treat of the American Admiralty, its jurisdiction and practice. Then follows an *appendix* containing the Admiralty rules established by the Supreme Court under the act of 1842; Rules of the practice of that Court; Rules of the Northern and Southern Circuit and District Courts of New York; Practical forms; Acts of Congress relative to taking testimony, and a complete list of the Judges and Clerks, with various other matters of interest. That the work will be a valuable aid in the Admiralty practice we have no doubt. But we cannot let the present occasion pass without expressing our regret that the author seems disposed to look with favor upon the encroachment by the United States Courts upon the Common Law rights of the State Courts under the claim of *admiralty jurisdiction*. When this encroachment is to be justified by passing lightly over the authority of Chancellor Kent, and by pronouncing Lord Coke, "unscrupulous and tyrannical" the professional mind is at once stimulated to question the extent of the Admiralty power thus claimed. Every inch of ground occupied by the United States Courts, which does not belong to them, is an invasion, to that extent, of the rights of the States; and every case drawn from the rightful jurisdiction of the common law courts is, *pro tanto*, an embarrassment of the *trial by jury*. Should the Supreme Court of the United States sustain the Admiralty jurisdiction, to the extent sometimes claimed and exercised by its subordinate tribunals, we may expect to see an alteration of the judicial tenure. The *elective principle*, so generally prevalent in the Judiciary of the States, may be found useful in its application to the Judiciary of the United States.

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